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LEGAL ASPECTS OF CONSTITUTIONAL BREAKDOWN IN
THE COMMONWEALTH - WITH PARTICULAR REFERENCE
TO NIGERIA AND SOUTHERN RHODESIA

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THE ABSTRACT

This Thesis aspires to examine and review the recent authoritative analyses of the legal aspects of constitutional breakdown in the Commonwealth, with particular reference to Nigeria and Southern Rhodesia. This work, concerned as it is with legal issues, does not examine the political aspects of constitutional breakdowns. Adherence to the title of this Thesis has thus required the exclusion therein of important political events like the Nigerian Civil War (1967-1970) and the Pearce Report (1972), CMND. 4964, on opinion in Southern Rhodesia.

The Thesis commences with an outline of Kelsen's Theory of Legal Norms because controversy has centred on his concept of the Grundnorm in relation to the change of government. This is followed in Chapter 2 by the background to the breakdown in Nigeria as well as the breakdown itself. The reaction of the Nigerian Judiciary is examined in Chapter 3, and Chapter 4 offers a Critique of this reaction.

Southern Rhodesia is introduced in Chapter 5 with a background to the breakdown in 1965. Chapter 6 presents a conspectus of the breakdown with mention of the measures adopted by the United Kingdom and Southern Rhodesia Governments, respectively, to assert their attitudes towards U.D.I. The different responses of the Judiciaries in Southern Rhodesia and the United Kingdom are the subject-matter of Chapter 7. On this subject-matter Chapter 8 attempts a Critique. The Critiques in Chapters 4 and 8 are specifically directed to Nigeria and Southern Rhodesia, respectively.

The Critique in Chapter 9 - the Concluding Critique - concentrates on the nature of legal orders in general; this Critique suggests a basis of legal analysis, which, it is hoped, avoids some of the confusion and complexity which have been precipitated by judicial and academic opinion.

MY ACKNOWLEDGMENTS

It is a source of no small satisfaction to me to be able to record my profoundly experienced debt to Mr. James S. Read for his painstaking and penetrating tutelage which rescued me from the uncertain sense of direction from which my endeavours not infrequently suffered. With his able and concerned supervision, Mr. Read encouraged me at moments when indolence distinguished an alarming measure of my work, but equally, the admonitory curb was never spared when speed appeared to supersede scholarship in my priorities. Without his meticulously informed and invariably sympathetic guidance, this Thesis would undoubtedly have galloped beyond that modicum of fallacies unavoidable in the study of as vigorously controversial a set of phenomena as the legal aspects of constitutional breakdown.

I wish also to express my thanks to Miss V.M. Campling for her exemplary and patient typing of the manuscript, as I realize only too well that the latter was conspicuous neither for its orderliness nor for the distinction of its calligraphy.

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PART IINTRODUCTION: THE THEORETICAL BACKGROUNDCHAPTER 1KELSEN'S THEORY OF LEGAL NORMS

It is pertinent to have the question answered: why is Kelsen accorded such importance in an examination of constitutional breakdowns? The answer is that Kelsen's Theory of Legal Norms is concerned with the functioning of an entire legal order and not with particular rules of law. Where particular legal provisions are no longer of conclusive authority, as where the very structure of the legal system, its very existence, is challenged, that is, where there is a constitutional breakdown, a theory of law is required that is designed to resolve the legal confusion in just such a situation by offering an analysis of the very structure of law in society. Where a legal order is impugned as a whole, the outcome is best decided after an examination of the legal order in terms of its wholeness or entirety. Such an approach is precisely that offered by Kelsen, and this no doubt accounts for the distinction his Theory of Legal Norms enjoys of being the only legal philosophy assimilated in its entirety by at least two courts in the Commonwealth (Pakistan and Uganda in 1958 and 1966 respectively: but the Supreme Court of Pakistan, after the latter's withdrawal from the Commonwealth in 1971, in 1972 overruled its decision in 1958).

But bearing in mind that Kelsen is only a jurist, it may be asked why the court in Pakistan in 1958 did not appeal to judicial precedent, but instead chose to turn to Kelsen? The answer is that until the decision in that case, there was no judicial pronouncement on such revolutionary situations. Failing judicial precedent, the court in Pakistan in 1958 gratefully accepted, or at least purported to accept, the rationalisation of legal orders so providentially presented by Kelsen.

The purpose of Kelsen's Theory of Legal Norms when seen in its Municipal context is the definition of a structure in National legal orders by reference to which structure law may be identified. The structure is given the form of a hierarchy of legal rules. Rules that belong to this hierarchy are laws: rules which do not are not. This system is designed to settle the confused disputes relating to the issue of what is and what is not law. The author's approach is aimed specifically at dispensing with all elements of justice, morality and divinity because, he claims, such elements have been unwarrantedly permitted to encrust, and hence to confuse, the issue of whether certain rules qualify as law. In fine, the desideratum of clarity through simplicity is what Kelsen promises to satisfy.

To Kelsen the structure of laws in a country is explained in terms of a hierarchy of legal norms, each norm deriving its validity from one prior to itself until the stage is reached when an absolutely prior, or the ultimate, norm logically terminates the process to form the complete

legal order. He defines a legal norm as being a proposition which postulates that upon the fulfilment of stated conditions, specified consequences ought to ensue therefrom or to attach thereto. Every law is a norm although in order to be such the particular law is not required to be expressed in the form of a norm, but only has to be explicable as such. When the legislator provides that a thief "will be" punished, that provision is a norm, and although it is not expressed in the form of a consequence attaching to a condition, this is the way the statement is to be explained. The statement, notwithstanding the phrase "will be", is not a mere prediction made by the legislator. This is how Kelsen puts it:¹

In particular, the general norms must be norms in which a certain sanction is made dependent upon certain conditions, this dependence being expressed by the concept of 'ought'. This does not mean that the law-making organs necessarily have to give the norms the form of such hypothetical 'ought' statements. The different elements of a norm may be contained in very different products of the law-making procedure, and they may be linguistically expressed in very different ways. When the legislator forbids theft, he may, for instance, first define the concept of theft in a number of sentences which form an article of a statute, and they stipulate the sanction in another sentence, which may be part of another article of the same statute or even part of an entirely different statute. Often the latter sentence does not have the linguistic form of an imperative or an 'ought' sentence but the form of a prediction of a future event. The legislator frequently makes use of the future tense, saying that a thief 'will be' punished in such and such a way. He

1. General Theory of Law and State: by Hans Kelsen, translated by Anders Wedberg (1945): Reissued (1961) by Russell and Russell (New York): at p.45.

then presupposes that the question as to who is a thief has been answered somewhere else, in the same or in some other statute. The phrase 'will be punished' does not imply the prediction of a future event - the legislator is no prophet - but an 'imperative' or a 'command', these terms taken in a figurative sense. What the norm-creating authority means is that the sanction 'ought' to be executed against the thief, when the conditions of the sanction are fulfilled.

Kelsen then moves on to point up the distinction between laws and a theory of law. Laws are prescriptive whereas a theory of law is descriptive: the norms prescribe what ought to be or not to be done; a theory about them describes what they do and what they are, it describes their authority to prescribe, but it cannot itself prescribe. This is how Kelsen makes the distinction:²

It is the task of the science of law to represent the law of a community, i.e. the material produced by the legal authority in the law-making procedure, in the form of statements to the effect that 'if such and such conditions are fulfilled, then such and such a sanction shall follow.' These statements, by means of which the science of law represents law, must not be confused with the norms created by the law-making authorities. ³ It is preferable not to call these statements norms, but legal rules. The legal norms enacted by the law creating authorities are prescriptive; the rules of law formulated by the science of law are descriptive. It is of importance that the term 'legal rule' or 'rule of law' be employed here in a descriptive sense. ⁴

2. Kelsen, op.cit., p.45.

3. My own underlining.

4. My own underlining.

Kelsen then compares and then distinguishes the sciences of law and nature. They both involve hypothetical judgements that attach certain consequences to certain conditions. In the law of nature, however, the condition in the judgment is the cause, the consequence the effect. The law of nature is the law of causality. It therefore differs from the legal rule in its manner of connecting the condition with the consequence. The law of nature provides that if A is B is or will be, whereas the legal rule postulates that if A is, B ought to be. The mode of description pertaining to the former thus relates to causality, that pertaining to the latter relates to normativity.

Because a norm in legal theory only provides for what ought to happen as distinct from what does happen, exceptions to it are not created by the fact that what it says ought to occur does not actually take place.⁵ The norm is not perforated if a thief is not brought to justice, because it merely says that he ought to, not will be, brought to justice. The law of nature, on the other hand, is not inexorable and in response to a refractory phenomenon of nature has to accept the latter's status as constituting an exception to it or to amend itself so as to incorporate the phenomenon.

The legal norm is valid irrespective of moral content.⁶ This has logically to be the position because

5. Kelsen, p. 46.

6. Kelsen, p. 48.

there is no objective criterion, or rather no universally accepted lodestone, for morality. What in a certain situation is considered just by one individual may appear unjust to another. Even different norms sharing the same hierarchy may embody moral precepts not only different from, but incompatible with, one another. If laws could be vitiated by inconsistency with views on morality, then every man would be a law unto himself. A norm, on the other hand, can be verified objectively by asking whether it belongs to a legal order which on the whole corresponds to political reality.

Having propounded the nature of a legal norm Kelsen proceeds to describe his hierarchy of norms.⁷ The pyramidal disposition of the norms is essential to organise all the multifarious norms which will otherwise be in disarray. The reason for the validity of a norm is always another norm prior to it in authority. The reason why the subsequent norm requires its validity to be sustained by a prior norm is that the subsequent norm is not self-evident, and therefore cannot but thrive umbilically on the prior norm. The statement "If a man kills without provocation he shall be hanged", is not self-evident in that the question may be raised as to why a man who does so ought to be so executed. It may then be discovered that this norm is derived from the following norm "Parliament shall have power to make laws, disobedience to which shall not be permitted."

7. Kelsen, p. 111.

The basic norm is then explained. This is the norm from which all other norms of the legal order derive their validity. No norm can be valid if its existence cannot be traced in terms of progressive priority to the basic norm. Since the basic norm is definitively ultimate it would be illogical to expect it to be able to point to further authority. But if it cannot justify its existence with prior authority how does it explain itself? The answer, we are told, has nothing to do with the idea of derivation: the basic norm sustains itself. It is an entity of presupposition. If the hierarchy of laws, of which it, the ultimate, is effective, is when assessed as a whole, then the basic norm is what it is because it happens to be what it is, the fount of a functioning legal order. It functions because it is functioning. The only pertinent question that can be raised in relation to it is whether it functions and not how it has come to function. If it functions, it is; if it does not function, it is not.

Kelsen is meticulous in his emphasis that the basic norm is not in any way affected by its constituent or constituents. These constituents enjoy by themselves no inherent paramountcy. Because no constituent enjoys intrinsic supremacy the identity of constituents cannot matter in the least. If God is regarded as the supreme legislator then God is the basic norm: if God is not so treated then He is not the basic norm. God is not the basic norm because He is God: He can be the basic norm

only by virtue of His being treated as such. Thus it is the treatment of, or attitude towards, Him that is the crux of the matter, not His being He.

The basic norm, in Kelsen's own words, is explained thus:⁸

The derivation of the norms of a legal order from the basic norm of that order is performed by showing that the particular norms have been created in accordance with the basic norm. To the question why a certain act of coercion - e.g., that fact that one individual deprived another individual of his freedom by putting him in jail - is a legal act, the answer is: because it has been prescribed by an individual norm, a judicial decision. To the question why this individual norm is valid as part of a definite legal order, the answer is: because it has been created in conformity with a criminal statute. This statute, finally, receives its validity from the constitution, since it has been established by the competent organ in the way the constitution prescribes.

If we ask why the constitution is valid, perhaps we come upon an older constitution. Ultimately we reach some constitution that is the first historically and that was laid down by an individual usurper or by some kind of assembly. The validity of this first constitution is the last presupposition, the final postulate, upon which the validity of all the norms of our legal order depends. It is postulated that one ought to behave as the individual, or the individuals, who laid down the first constitution have ordained. This is the basic norm of the legal order under consideration. The document which embodies the first constitution is a real constitution, a binding norm, only on the condition that the basic norm is presupposed to be valid. Only upon this presupposition are the declarations of those to whom the constitution confers norm-creating power binding norms. It is this presupposition that enables us to distinguish between individuals who are legal authorities and other individuals whom we do not regard as such, between acts of human beings which create legal norms and acts which have

8. Kelsen, p. 115.

no such effect. All these legal norms belong to one and the same legal order because their validity can be traced back - directly or indirectly - to the first constitution. That the first constitution is a binding legal norm is presupposed, and the formulation of the presupposition is the basic norm of this legal order. The basic norm of a religious norm system says that one ought to behave as God and the authorities constituted by Him command. Similarly, the basic norm of a legal order prescribes that one ought to behave as the 'fathers' of the constitution and the individuals - directly or indirectly - authorized (delegated) by the constitution on command. Expressed in the form of a legal norm: coercive acts ought to be carried out only under the conditions and in the way determined by the 'fathers' of the constitution or the organs delegated by them. This is, schematically formulated, the basic norm of the legal order of a single state, the basic norm of a national legal order.

Kelsen continues by describing the function of the basic norm:⁹

That a norm of the kind just mentioned is the basic norm of the national legal order does not imply that it is impossible to go beyond that norm. Certainly one may ask why one has to respect the first constitution as a binding norm. The answer might be that the fathers of the first constitution were empowered by God. The characteristic of so-called legal positivism is, however, that it dispenses with any such religious justification of the legal order. The ultimate hypothesis of positivism is the norm authorizing the historically first legislator. The whole function of this basic norm is to confer law-creating power on the act of the first legislator and on all the other acts based on the first act. To interpret these acts of human beings as legal acts and their products as binding norms, and that means to interpret the empirical material which presents itself as law as such, is possible only on the condition that the basic norm is presupposed as a valid norm. The basic norm is only the necessary presupposition of any positivistic interpretation of the legal material.

9. Kelsen, p. 116.

The basic norm is not created in a legal procedure by a law-creating organ. It is not - as a positive legal norm is - valid because it is created in a certain way by a legal act, but it is valid because it is presupposed to be valid; and it is presupposed to be valid because without this presupposition no human act could be interpreted as a legal, especially as a norm-creating, act.

Kelsen says that a basic norm is not eternal.

This is because the legal order of which it is the summit can be overthrown. When a legal order is thus supplanted a new order with its own basic norm emerges. The overthrow cannot be scrutinised in terms of legal rules enshrined in the old order because a scrutiny of such a nature would imply that the new grundnorm had to have legal validity - an implication that would contradict what has already been posited of the grundnorm, namely, that it is because it is and not because it is permitted or authorised. But how is an overthrow to be defined? This happens when the hierarchy of norms ceases to reflect political reality.

Kelsen is of opinion that after an overthrow such legal rules as are allowed to operate despite their having been embodied in the norms of the old order do so because of their being freshly incorporated into the norms of the new order, and not because the norms of the old order have paradoxically survived.

Kelsen's view of the emergence of a new legal order is best described in his own words:¹⁰

The validity of legal norms may be limited in time, and it is important to notice that the end as well as the beginning of this validity

10. Kelsen, p. 117.

is determined only by the order to which they belong. They remain valid as long as they have not been invalidated in the way which the legal order itself determines. This is the principle of legitimacy.

This principle, however, holds only under certain conditions. It fails to hold in the case of a revolution, this word understood in the most general sense, so that it also covers the so-called coups d'etat. A revolution, in this wide sense, occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is in a way not prescribed by the first order itself. It is in this context irrelevant whether or not this replacement is effected through a violent uprising against those individuals who so far have been the 'legitimate' organs competent to create and amend the legal order. It is equally irrelevant whether the replacement is effected through a movement emanating from the mass of the people, or through action from those in government positions. From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated. Usually, the new men whom a revolution brings to power annul only the constitution and certain laws of paramount political significance, putting other norms in their place. A great part of the old legal order 'remains' valid also within the frame of the new order. But the phrase 'they remain valid', does not give an adequate description of the phenomenon. It is only the contents of these norms that remain the same, not the reason of their validity. They are no longer valid by virtue of having been created in the way the old constitution prescribed. That constitution is no longer in force; it is replaced by a new constitution which is not the result of a constitutional alteration of the former. If laws which were introduced under the old constitution 'continue to be valid' under the new constitution, this is possible only because validity has expressly or tacitly been vested in them by the new constitution. The phenomenon is a case of reception (similar to the reception of Roman law). The new order 'receives', i.e., adopts, norms from the old order; this means that the new order gives validity to (puts into force) norms which have the same content as norms of the old order. 'Reception' is an abbreviated procedure of law-creation. The laws which, in the ordinary inaccurate parlance, continue to be valid are, from a juristic

viewpoint, new laws whose import coincides with that of the old laws.¹¹ They are not identical with the old laws, because the reason for their validity is different. The reason for their validity is the new, not the old, constitution, and between the two continuity holds neither from the point of view of the one nor from that of the other. Thus, it is never the constitution merely but always the entire legal order that is changed by a revolution.

This shows that all norms of the old order have been deprived of their validity by revolution and not according to the principle of legitimacy and they have been so deprived not only *de facto* but also *de jure*. No jurist would maintain that even after a successful revolution the old constitution and the laws based thereupon remain in force, on the ground that they have not been nullified in a manner anticipated by the old order itself. Every jurist will presume that the old order - to which no political reality any longer corresponds - has ceased to be valid, and that all norms, which are valid within the new order, receive their validity exclusively from the new constitution. It follows that, from this juristic point of view, the norms of the old order can no longer be recognised as valid norms.

Kelsen proceeds to expound the predicament of those who contemplate revolutions. When a rebellion begins, and before it receives the accolade of success, those who participate in it have broken the legal rules contained in the norms of the legal order at whose overthrow the rebellion is aimed. At this stage what is being done is clearly unlawful, and if the rebellion is crushed the law, as contained in the norms of that legal order whose overthrow has not been accomplished, will take its course. If, however, the rebellion succeeds, the old order is superseded and whatever legal rules of the old order the new order desires important to incorporate, it can safely be assumed that those rules

11. Kelsen, p. 118.

which had operated against the new rulers when they had been mere rebels will not be sustained by such incorporation. By such means are successful rebels protected from the initial illegality that stigmatizes incipient insurgency. Kelsen takes us through the process most eloquently:¹²

It is just the phenomenon of revolution which clearly shows the significance of the basic norm. Suppose that a group of individuals attempt to seize power by force, in order to remove the legitimate government in a hitherto monarchic State, and to introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. It is now according to this new order that the actual behaviour of individuals is interpreted as legal or illegal. But this means that a new basic norm is presupposed. It is no longer the norm according to which the monarchic constitution is valid, but a norm endowing the revolutionary government with legal authority. If the revolutionaries fail, if the order they have tried to establish remains inefficacious then, on the other hand, their undertaking is interpreted, not as a legal, a law-creating act, as the establishment of a constitution, but as an illegal act, as the crime of treason, and this according to the old monarchic constitution and its specific basic norm.

In his discussion of legal orders Kelsen points to the important difference between the relationship of the basic norm to its subordinate norms and that between the efficacy of the legal order and its norms. The subordinate norms are valid only by reason of their being traceable to the basic norm. They are valid because the basic norm says

12. Kelsen, p. 118.

so. But it would be incorrect to say that the norms of a legal order are valid because the efficacy of that order says so. The efficacy of the legal order is not the reason for the validity of the norms found in it: the efficacy is merely a condition precedent to the validity of the norms and not a constituent element in that validity. This is made evident in one of the most important passages in his work:¹³

If we attempt to make explicit the presupposition on which these juristic considerations rest, we find that the norms of the old order are regarded as devoid of validity because the old constitution and, therefore, the legal norms based on this because the actual behaviour of men does no longer conform to this old legal order. Every single norm loses its validity when the total legal order to which it belongs loses its efficacy as a whole. The efficacy of the entire legal order is a necessary condition for the validity of every single norm of the order. A condition *sine qua non*, but not a condition *per quam*. The efficacy of the total legal order is a condition, not the reason for the validity of its constituent norms. These norms are valid not because the total order is efficacious, but because they are created in a constitutional way. They are valid, however, only on the condition that the total order is efficacious; they cease to be valid, not only when they are annulled in a constitutional way, but also when the total order ceases to be efficacious. It cannot be maintained that, legally, men have to behave in conformity with a certain norm, if the total legal order, of which that norm is an integral part, has lost its efficacy. The principle of legitimacy is restricted by the principle of effectiveness.

13. Kelsen, p. 119.

The Judicial Response to Kelsen's Theory

Kelsen's Theory has been purportedly applied in two judicial decisions in the Commonwealth. The first was in Pakistan in 1958; the second followed eight years later in Uganda. Although Kelsen has been canvassed in other constitutional litigation in the Commonwealth¹⁴, only in Pakistan and Uganda have the courts expressly relied on the Theory of Norms to support their conclusions.

It may at first appear anomalous that the judiciary should embody as the basis of their ratio decidendi a legal theory propounded by a jurist, instead of resorting to the usual foundations of precedent and enacted law. The explanation is twofold. First, in the case of Pakistan in 1958 there was no previous judicial decision to which the judges could turn to sustain their conclusion. It is true that the revolution in Pakistan was not the first of its kind in the Commonwealth (there was the Glorious Revolution of 1688) but it was unprecedented in the sense that its effectiveness was impugned before the courts. The second reason for the court's unusual approach was that precisely because the contention centred on whether the old legal order had or had not been displaced the validity of the alternative conclusions open to the court could not have been rested on any law of the old or new legal order, since

14.(i) MADZIMBAMUTO v. LARDNER-BURKE:

G.D.: 1966 R.L.R. 756;

A.D.: 1968 (2) S.A. 284, 457;

P.C.: [1969] (1) A.C. 645.

(ii) LAKANMI AND OLA v. ATTORNEY-GENERAL FOR THE WESTERN STATE OF NIGERIA; 24th APRIL, 1970 (Unreported): SC. 58/69.

such a step would be tantamount to postulating that A was supreme only because A claimed to be supreme. A criterion exclusive of any provided by A and B could alone have been applied to decide the conflict. Such a criterion not having been obtainable either through precedent or enacted law, had to be discovered among one of the legal theories propounded by jurists of acknowledged eminence. But among these theories none but that of Kelsen was close enough to be applied with a degree of plausibility. One could reply to the possible objection that in Uganda the court could have rested its case exclusively on the precedent set in Pakistan, by saying that since that precedent itself was founded exclusively on Kelsen the Ugandan court was right to have had direct recourse to the jurist. The Ugandan court did refer to the decision in Pakistan but the reference was by way of illustration only. The court did not say that because the court in Pakistan had said that Kelsen applied, that decision was decisive by way of precedent. Rather the Ugandan court opined that Kelsen's Theory applied because it was obviously applicable and not only because it had been applied before. In short, the Ugandan court would not have been deterred even if a revolutionary situation had not arisen in Pakistan in 1958.

Having attempted an analysis of the probable motives that actuated the respective courts to do what they have done, we shall now assess the legal import of the situation in 1958 in Pakistan, which was treated by the court there as a revolutionary situation.

The first Constitution of Pakistan was enacted in March, 1956. This Constitution was purportedly annulled by the President in a Proclamation in October, 1958. The President, who held office under the 1956 Constitution, dismissed the Central Cabinet and the Provincial Cabinets. He also dissolved the National Assembly together with both the Provincial Assemblies. Martial law was declared throughout the country and the Commander-in-Chief of the Pakistan Army was appointed by the President as Chief Martial Law Administrator. Shortly afterwards (three days after the annulment of the 1956 Constitution) the President (it is intriguing that he should still have regarded himself as President even after purporting to annul that Constitution under which he held office) purported to promulgate the Laws (Continuance in Force) Order which, except for the 1956 Constitution itself, revived all the laws in existence before the annulment of the 1956 Constitution.

The validity of the act of annulment by the President came up for adjudication before the Supreme Court of Pakistan by way of a criminal appeal. We are not concerned with the details of the criminal law. Suffice it to say that the validity of the new legal order had to be decided before the criminal appeal could be settled.

The Chief Justice quoted Kelsen but he also paraphrased the jurist. After this exercise the Chief Justice

said very briefly that Kelsen's Theory applied because the revolution was efficacious.¹⁵ In his most important passage the Chief Justice said:¹⁶

It sometimes happens, however, that a Constitution and the National legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order For the purposes of the doctrine here explained a change is, in law, a revolution if it annuls the Constitution and the annulment is effective.... Thus the essential condition to determine whether a Constitution has been annulled is the efficacy of the change.

The Laws (Continuance in Force) Order was thus adjudged to be the new Pakistani Grundnorm. It is not proposed at this stage to discuss the question of whether Kelsen's Theory was correctly applied or whether situations such as that just examined can ever be resolved by recourse to it.

The revolutionary situation in Uganda in 1966 (as distinct from that in 1971) will now be discussed. Uganda became independent in 1962 and the Constitution by which it was governed was unchallenged from that date until February, 1966, when the Prime Minister purported to suspend it. Events from February to April ended with the purported annulment of the 1962 Constitution by the National Assembly in April. By resolution the National Assembly approved and promulgated what purported to be a new Constitution,

15. The state v. Dosso (1958)
Pakistan Supreme Court Reports, p.180, at p.186.

16. Dosso: pp. 184-185.

the 1966 Constitution. It is important to notice that the change constituted a breach of legal continuity in that the 1966 Constitution is NOT introduced in accordance with the provisions of the 1962 Constitution. The issue of whether the 1966 Constitution was valid was brought before the High Court of Uganda when the latter was asked to decide whether a person had been properly detained when the powers of detention were derived from Emergency Regulations made under the 1966 Constitution.

The Chief Justice of Uganda founded his conclusion on Kelsen's Theory of the Grundnorm. His Lordship agreed with the Attorney-General¹⁷ that a legal order can be overthrown by an abrupt and fundamental political change which that legal order does not contemplate. The change must be fundamental in the sense that the entire old legal order has to be destroyed except what the new legal order chooses to preserve and that such laws as survive do so as laws of the new legal order. The new legal order must also be effective before it can be recognised as such.

One difference between the judgments of the two courts is that the Uganda High Court regarded Kelsen's Theory as embodying a principle of international law whereas the Supreme Court of Pakistan was silent as to whether Kelsen's Theory was meant for international or national law. The Chief Justice of Uganda does not explain how a municipal court, such as his own, can find the

17. Uganda v. Comr. of Prisons, ex parte Matovu
(1966) E.A. p. 514, at pp. 534-535.

jurisdiction to make a ruling of international law, as distinct from a ruling of national law regarding an international issue. It is suggested that if Kelsen's Theory is applicable to such situations by municipal courts the latter should treat the Theory as embodying a principle of national law.

That the learned Chief Justice of Uganda had presumed to make a pronouncement on international law is made manifest in this short extract from his judgment:¹⁸

The Constitution had extra legal origin and therefore created a new legal order. Although the product of a revolution, the Constitution is none-the-less valid because in international law ¹⁹ revolutions and coups d'etat are the recognised methods of changing governments and constitutions in sovereign states.

His Lordship withholds from us the explanation as to why a rule of international law (assuming that there is such a rule) is to be, without more, incorporated into the rules of a municipal legal order; or, alternatively how his court could have obtained the competence to apply a rule of international law when dealing with litigation concerning the domestic municipal law.

As stated earlier, in 1972 the Supreme Court of Pakistan overruled its own decision in 1958 (State v. Dosso). It did so in Asma Jilani v. The Government of the Punjab and Another.²⁰ Although this case will not be examined until later, it is proposed to mention here that it refused

18. ex parte Matovu, p. 537.

19. My own emphasis.

20. P.C.D. 1972. S.C. 139.

to apply or adopt Kelsen's Theory of Legal Norms because it maintained that the Theory was merely a juristic proposition which was not intended for use by judges.²¹ The Theory, being descriptive only, could not, the court maintained, bind judges in the administration of law and justice.

SOME OBSERVATIONS ON KELSEN'S THEORY OF THE GRUNDNORM.

Kelsen's Theory has been criticized but it is submitted that the criticisms of his theory do not vitiate the logic that informs his structure of norms. Kelsen, as we have seen, set out to propound a thesis of law whereby laws can be identified without recourse to issues of justice and morality which in his view serve only to confuse the process of identification. That was why he called his theory the Pure Theory of Law. Professor Friedmann²², however, asserts that his (i.e. Kelsen's) theory does not enjoy the purity from extraneous considerations that its author claims for it. Professor Friedmann fastens on Kelsen's definition of the grundnorm as the peak of a structure of norms which taken as a whole is efficacious, and critically inquires:²³

21. P.C.D. 1972. S.C. 139, at 179.

22. Legal Theory (fifth edition) by W. Friedmann, published by Stevens (1967).

23. Friedmann: p. 285.

How can the minimum of effectiveness be proved except by an inquiry into political and social facts? And this implies the necessity of a further political choice: Does the obedience of the majority, of an enlightened minority or sheer physical force decide? Whatever the answer, purity here ceases.

The short answer to Professor Friedmann's trilemma is that whoever can enforce his will, the mode or instrumentality chosen to accomplish this being a distinct and irrelevant matter, will be supreme. If a majority of the people desire A and in fact executes it despite, or in the absence of, opposition from other quarters then the will of the majority will prevail. If an enlightened minority can cajole their way to power, then their will is surely supreme. Again, there is no reason why a minimum of effectiveness cannot come from sheer physical force. It is the fact of efficacy that matters, not the means employed to achieve it. When Professor Friedmann says "Whatever the answer," he means only whatever criteria, whether or not these be within the range of his suggested alternatives, are chosen to identify the efficacy of which Kelsen speaks, Kelsen's Theory becomes impure thereat. But, of course, "Whatever the answer," does not include an answer which undermines the presupposition of his question that the answer, whatever it is, has to be an answer identifying the criteria used to identify the minimum of effectiveness. What Professor Friedmann considers to be the possible alternative constituents of the identified attribute or quality are in fact only the means

of identification for the attribute or quality in question. The fact that Grundnorm A is effective because it is not opposed and that it is not opposed because those who do not oppose it forbear from doing so on the ground that it is morally meritorious, does not mean that moral merit enters into the definition of the grundnorm, since it is its efficacy, not how that efficacy has been achieved, that validates a legal order. Does A have support is surely distinct from why A has that support. Professor Friedmann's alternatives are seen by him to be constituents of the Grundnorm, and thus to deprive the latter of its purity. But if his alternatives are seen to have their relevance to the identification of the Grundnorm in their effect, and not their respective essences, it will be realized that because their essences are not involved in the phenomenon of identification, such essences are not in a position to affect the Grundnorm's purity. Assuming that a particular Grundnorm is able to exact conformity to its dictates because the majority of citizens obey it, this does not mean that such majority is the Grundnorm or that the Grundnorm is made up of such majority's obedience to it. Efficacy is the indispensable condition precedent to the existence of a Grundnorm. The fact that such efficacy has been brought about by, or is constituted of, one or more of Professor Friedmann's alternatives does not mean that the Grundnorm is not pure. Even if such efficacy is not only a condition precedent to, but is a constituent of, a Grundnorm, the latter still retains its purity because

the efficacy is the effect, not the essences, of his alternatives. And further, even if Professor Friedmann were to contend that the essences of his alternatives necessarily included their effects, this inclusion could only cover such effects as were necessarily constitutive of their respective essences. Now, it cannot be asserted that efficacy is a necessary effect of, and hence a constituent of, any of his alternatives. Hence his alternatives do not in any way affect the essence of a Grundnorm, and thus cannot deprive the latter of its absolute purity and freedom from non-normative phenomena.

However, let us assume that Kelsen's theory is impure. Does this assumed impurity vitiate his description of the hierarchy of norms? No. The lack of absolute purity in his legal pyramid does not demonstrate the illogicality of the pyramidal structure which his theory constructs. The structure is there to assist the identification enjoyed by different legal rules within a system. Whatever impurity may mean it does not destroy the function the structure has been designed to fulfil.

Let us now move on to another point. The courts, in applying Kelsen's theory assume that the theory is prescriptive. How can they cite him if his theory is there only to describe? However, this distinction may not be as important as it appears. Consider this statement: an Act of Parliament is (shall be) an instrument expressed to be such, which instrument has been approved by the Crown, the House of Lords and the House of Commons, such that the

approval of the last two bodies shall be (is) expressed in the manner provided by their respective Standing Orders relating to such matter, and such that the approval of the Crown shall be (is) expressed through the Royal Assent. An instrument so processed is an Act of Parliament. Does it matter whether the phrase "shall be" or the word "is" is used? In short, does it matter whether the statement is prescriptive or descriptive? It is submitted that it matters not.

It therefore does not matter whether Kelsen's Theory is interpreted to say "if such happens, then such shall be regarded as a revolution" or "if such happens, then such is a revolution". In either case, a revolution has been effected.

The last point it is proposed to make is that Kelsen's Theory does not purport to guide the legislator as to what legal rules to enact. If a legislator wants to create a body of desirable legal rules Kelsen is not someone who can help him. It can be said of his theory that it is too limited in scope and that therefore as a theory of law it is inadequate, but it cannot be said that, within the scope it prescribes for itself, it is incorrect. However, although its correctness may be unimpeachable; nevertheless its purported applications in the context of constitutional breakdowns do not invariably partake of this unimpeachability. This will be examined in subsequent chapters.

PART II

CONSTITUTIONAL BREAKDOWN IN NIGERIA

CHAPTER 2

THE BACKGROUND AND THE BREAKDOWN

(1) The Background^{1.}

Nigeria achieved her independence from the United Kingdom on October 1, 1960. It then had a federal structure of government with the pre-independence fabric of three regional governments², each enjoying a considerable measure of autonomy. The Federal Constitution at independence³ contained two legislative lists: the Exclusive List and the Concurrent List. The Federal Government could legislate on matters enumerated on either list, and, additionally, ~~on matters left in residue.~~ The Regions were

1. See Nigeria: Crisis and beyond, by John Oyinbo: (London: Charles Knight and Co., Ltd., 1971); Crisis and Conflict in Nigeria, by A.H.M. Kirk-Greene: (London: O.U.P., 1971); Nigerian Politics and Military Rule: Prelude to the Civil War, edited by S.K. Panter-Brick: (London: The Athlone Press, 1970).
See further The Barrel of a Gun - Political Power in Africa and the Coup, by Ruth First: (London: Penguin Books, 1969).
Of background interest is Nigerian Government and Politics, by J.P. Mackintosh: (London: Allen and Unwin Ltd., 1966).
2. The Federation was divided into FOUR regions in 1962 by dividing one of the existing regions (The Western Region) into two regions (The Western and the Mid-Western Regions).
3. Three years later (October 1, 1963) Nigeria became a Republic and ceased to be a dominion.

to legislate on the matters set out in the Concurrent List and those left in residue. Thus the Federation and the Regions had legislative authority concurrently over the Concurrent List ~~and matters on neither list~~ ~~the residue~~. However, where Federal and Regional legislation conflicted in the concurrent field, Federal laws were to prevail and the Regional laws were void to the extent of their inconsistency with the Federal legislation.

The Federal structure was so balanced that the Northern Region (the remainder being the Western and Eastern Regions) was able to enjoy a seemingly permanent hegemony in that it had an absolute majority of seats in the Federal House of Representatives (the other House being the Senate which, in common with most other Second Chambers, was politically ineffective) over the other Regions combined. This division of seats stemmed from the fact that the seats were allocated on the basis of population in which the Northern Region enjoyed a preponderance. These are the figures of the 1952-3 Census:⁴

(1)	The Northern Region	:	16,835,582
(2)	The Eastern Region	:	7,215,251
(3)	The Western Region	:	6,085,065
(4)	The Federal Territory of Lagos:	:	<u>267,407</u>
	TOTAL	:	<u><u>30,403,305</u></u>

4. Mackintosh, op.cit., p. 547.

This Census is distinguished by two important characteristics. It was the last census before independence and it is the most recent census that is undisputed. The censuses in 1962-3 and 1963-4 were bitterly disputed at the time and have yet to be accepted. The seats in the House of Representatives at independence were distributed in accordance with the statistics in the 1952-3 Census.

Of the 312 seats in the House of Representatives at independence, the Northern Region was given 174; the Eastern Region 73; the Western Region 62; and the Federal Territory of Lagos, 3.

Political manoeuvre both before and after independence thus consisted of attempts to accomplish the creation of coalitions of political parties designed to ensure that the successful coalition should yield a permanent majority of seats in the Federal Parliament required for the indefinite control of the government of the country. These coalitions each endeavoured to render the quinquennial federal general elections (of which since independence there has been only one) into pious rituals, the results of which would be foreordained. At independence Nigeria had three main political parties, each of which was regionally based. The Northern Peoples' Congress (N.P.C.) had its stronghold in the Northern Region; the Action Group (A.G.) derived its support from the electorate of the Western Region; and the National Council of Nigerian Citizens (N.C.N.C.) held sway in the Eastern Region.

On the third anniversary of Nigeria's independence the country became a republic, replacing its Governor-General with a President. This change did not alter the structure of power viewed either politically or legally. The net result appears to have been the substitution of the President for the Queen as Head of State.

In view of the later role of the Federal Cabinet in the constitutional upheaval in January, 1966, it is proposed to offer a short survey of the Cabinet as well as of the special powers vested in Parliament for use in national emergencies.

(i) The Federal Cabinet⁵

The function of the Federal Cabinet, described in the Republican Constitution of 1963 as the Council of Ministers, was to exercise the executive power of the federal government, sometimes directly, and on other occasions through the President who was obliged to execute such "advice" as the Council of Ministers saw fit to tender to him. The Council comprised the Prime Minister and such Ministers in the Federal Government as the President acting on the advice of the Prime Minister, chose to appoint. A person ceased to be a member of the Council if he was no longer a Minister in the Federal Government or if the Prime Minister should advise the President to dismiss him. Portfolios were to be distributed by the President acting on the Prime Minister's advice. The Prime Minister was to be appointed from the House of Representatives (the Lower and more powerful House, the other being the Senate) by the President, who must be satisfied that such person was "likely to command the support of the majority of the members

5. 1963 Republican Constitution: Ss. 84, 85, 87, 88, 89, 90, 91, 92.

of the House".⁶ The Executive Powers of the Federation (i.e. of the federal government) were important, and the two sections defining them will be quoted in full.⁷

84. - (1) The executive authority of the Federation shall be vested in the President and, subject to the provisions of this Constitution, may be exercised by him either directly or through officers subordinate to him.

(2) Nothing in this section shall prevent Parliament from conferring functions on persons or authorities other than the President.

85. The executive authority of the Federation shall extend to the execution and maintenance of this Constitution⁸ and to all matters with respect to which Parliament has for the time being power to make laws.

Another important provision pertaining to the Council of Ministers was the power of the President to appoint some other member of the Council of Ministers to perform the functions of the Prime Minister when the latter was unable to act. S.92 read:⁹

6. S.87 of the 1963 Constitution.

7. Ss.84 and 85 of the 1963 Constitution.

8. The underlining is mine. Does the word "maintenance" imply that the President or Acting President was empowered to take whatever measures he thought were necessary for the preservation of the Constitution? Such measures would, of course, have had to be taken on the advice of his Council of Ministers, in view of S.89 which enjoined that this was to be the case. If "maintenance" had the meaning suggested, this would mean that the Council of Ministers could have advised the President or Acting President to resort to measures not otherwise authorised by the Constitution. That power would have been extensive.

9. S.92 of the 1963 Constitution.

92. - (1) Whenever the Prime Minister is absent from Nigeria or is for any other reason unable to perform the functions conferred upon him by this Constitution, the President may authorise some other member of the Council of Ministers of the Federation to perform those functions (other than the functions conferred by this section) and that member may perform those functions until his authority is revoked by the President.

(2) The powers of the President under this section shall be exercised by him in accordance with the advice of the Prime Minister:

Provided that if the President considers that it is impracticable to obtain the advice of the Prime Minister owing to his absence or illness he may exercise those powers without that advice. 10

(ii) The Emergency Powers of the Federal Parliament. 11

The powers of Parliament in an emergency were defined in S.70 thus:¹²

70. - (1) Parliament may at any time make such laws for Nigeria or any part thereof with respect to matters not included in the Legislative Lists as may appear to Parliament to be necessary or expedient for the purpose of maintaining or securing peace, order and good government during any period of emergency.

10. My own underlining.

The proviso will prove important when we come to consider the abduction and subsequent murder of the Prime Minister in January, 1966, and the meeting of the Council of Ministers to decide the future of the country. The power vested in the President was exercisable by the Acting President in the case of the former's absence or incapacity. S.39 of the 1963 Constitution.

11. S.70 of the 1963 Constitution.

12. S.70 of the 1963 Constitution.

(2) Any provision of law enacted in pursuance of this section shall have effect only during a period of emergency:

Provided that the termination of a period of emergency shall not affect the operation of such a provision of law during that period, the validity of any action taken thereunder during that period, any penalty or punishment incurred in respect of any contravention thereof or failure to comply therewith during that period or any proceeding or remedy in respect of any such penalty or punishment.

(3) In this section 'period of emergency' means any period during which -

(a) the Federation is at war;¹³

(b) there is in force a resolution passed by each House of Parliament declaring that a state of public emergency exists; or

(c) there is in force a resolution of each House of Parliament supported by the votes of not less than two-thirds of all the members of the House declaring that democratic institutions in Nigeria are threatened by subversion.

(4) A resolution passed by a House of Parliament for the purposes of this section shall remain in force for twelve months or such shorter period as may be specified therein:

Provided that such resolution may be revoked at any time for a further period not exceeding twelve months by resolution passed in like manner.

(iii) The Political Crisis of 1965

Since our chief concern is the fundamental constitutional significance of the coup in January, 1966 and no more, it is not proposed to delve into the strife of parties, the quarrels of tribes (or races) or the mass killings resulting therefrom, excepting such events and occurrences

13. Can this expression be extended to include military coups and civil wars?

as are strictly necessary for an examination of the legal issues (other aspects of the crisis - fascinating and momentous as these undoubtedly are - must regrettably be omitted) born of the upheaval in January, 1966.

The federal election in December, 1964, confirmed and continued the government of the federation in the hands of the Northern Peoples' Congress. The government of the federation was strictly a coalition government but it was clear that the Northern Peoples' Congress effectively controlled the affairs of the Federation, in that that party had a majority of seats in the House of Representatives. The result of this election was disputed with spiralling bitterness. Reciprocal allegations of intimidation and fraud in the conduct of the election were hurled at each other with escalating vehemence by the antagonists. This unabated virulence was accentuated by the victory in the Western Region¹⁴ election in October, 1965, of that party in the Region¹⁵ which had seceded from the Action Group to form a coalition with the Northern Peoples' Congress: this coalition was known as the N.N.A. (the Nigerian National Alliance). The victory was castigated by the opposing coalition (U.G.P.A. - the United Peoples Grand Alliance) as one brought about by blatant intimidation through undisguised thuggery. This stricture provoked the expected strain of

14. In 1963 the Western Region had been divided into two Regions: the Western Region and the Mid-West Region, the latter being located between the former and the Eastern Region.

15. The Nigerian National Democratic Party (N.N.D.P.), formerly the U.P.P. (the United People's Party). This party was led by Chief Akintola whereas the Action Group was headed by Alhaji Adegbenro.

political recrimination which continued into the New Year (1966). It was in the first month of this year that the military in Nigeria threw itself into the fray by attempting to cut the Gordian Knot of party vituperation. It is the legal effect of this coup, however, not the political motivations behind it, that concerns us.

(2) The Military Coup of January 1966

The day of the coup was January 15, 1966. In the early hours of the morning a Major Nzeogwu launched an attack on the house of the Premier of the Northern Premier in Kaduna.¹⁶ The defence of the Premier's Lodge was inadequate and the Premier was shot dead. Later the Regional Governor was detained and the two highest ranking army officers in Kaduna were killed. When morning came Kaduna was firmly under the control of the rebels. In the afternoon (at one o'clock) Major Nzeogwu spoke on the radio and purported to declare martial law in the Region and dissolve the Regional Government.¹⁷ Part of the speech reads:¹⁸

16. Capital of the Northern Region.

17. Oyinbo, op.cit., p.40.

18. Kirk-Greene, op.cit. (vol. 1), Doc. No. 2, p. 125.

In the name of the Supreme Council of the Revolution of the Nigerian Armed Forces I declare martial law over the Northern Provinces of Nigeria. The Constitution is suspended and the Regional Government and elected assembly are hereby dissolved. All political, cultural, tribal and trade union activities together with all demonstrations and unauthorised gatherings, excluding religious worship, are banned until further notice.

The aim of the Revolutionary Council is to establish a strong, united and prosperous nation, free from corruption and internal strife. Our method of achieving this is strictly military, but we have no doubt that every Nigerian will give us maximum co-operation by assisting the regime and not, repeat not, disturbing the peace during the slight changes that are taking place. I am to assure all foreigners living and working in this part of Nigeria that their rights will continue to be respected. All treaty obligations previously entered into with any foreign nations will be respected, and we hope that such nations will respect our country's territorial integrity and will avoid taking sides with enemies of the revolution and enemies of the people.

My dear countrymen, you will hear and probably see a lot being done by certain bodies charged by the Supreme Council with the duties of national integration, supreme justice, general security, and properties recovery. As an interim measure all Permanent Secretaries, Corporation Chairmen, and similar Heads of Departments are allowed to make decisions until the new organs are functioning, so long as such decisions are not, repeat not, contrary to the aims and wishes of the Supreme Council. No Minister or Parliamentary Secretary possesses administrative or other forms of control over any Ministry even if they are not, repeat not, considered too dangerous to be arrested.....

My dear countrymen, no citizen should have anything to fear as long as that citizen is law abiding and if that citizen has religiously obeyed the major laws of the country and those set down in every heart and conscience since 1 October, 1960. Our enemies are the political

profiteers, swindlers, the men in the high and low places that seek bribes and demand ten per cent, those that seek to keep the country divided permanently so that they can remain in office as Ministers and VIPs of waste, the tribalists, the nepotists, those that make the country look big for nothing before international circles, those that have corrupted our society and put the Nigerian political calendar back by their words and deeds.

Before offering any comment on this broadcast, it is important to note what was happening that same day (January 15, 1966) in the rest of Nigeria. In Lagos¹⁹, the Prime Minister, Sir Abubakar Tafawa Balewa, and the Minister of Finance, Chief Festus Okotie-Eboh, were kidnapped, and they were both killed later in the day. Several senior army officers in Lagos were also assassinated that day. It is reputed that the G.O.C. of the Nigerian Army escaped death because a Lieut-Col. Pan, who was one of the senior army officers killed, had warned him of the danger only shortly before his (Pan's) death. It is said by the G.O.C. himself (Major-General Ironsi) that upon being warned he fled to Ikeja barracks and organised the loyal troops for a counter-offensive.²⁰ After this, the precise concatenation of events in Lagos that day is not clear. What is clear is that by evening Lagos was firmly under the control of General Ironsi.

Having seen what occurred in Kaduna and Lagos we will now proceed to the events at Ibadan, capital of Western

19. Oyinbo, op.cit., pp. 39-42.

20. Ibid.,

Nigeria. Chief Akintola, Premier of that Region, was killed by the rebels assigned to cover that area of the rebellion. But the soldiers there, unlike those in Kaduna, did not acquire control of the city - the reasons for this omission are not evident. Instead they drove to Lagos (perhaps to make sure that the rebellion had Lagos securely under its wing, despite the fact, as we have seen, that they already had a detachment of troops there). On arrival they found that the city was under the control, not of their collaborators there, but of General Ironsi.

In Enugu, capital of Eastern Nigeria, there were no assassinations or arrests. In fact, in the morning (January 15, 1966) the Governor and Premier had bade farewell to the President of Cyprus, Archbishop Makarios. In the afternoon the Governor and the Solicitor-General attended a Boy Scout rally at Enugu Stadium. However, although there was calm the troops had in fact since dawn surrounded that sector of the city where the Regional Ministers had their residences.

In Benin, the capital of Mid-West Nigeria, there was, as in Enugu, no murder or arrest. In the morning troops had arrived there as in Enugu but they took no action. These troops were subsequently withdrawn, but their withdrawal was ordered by General Ironsi, not by the rebels.

Thus the picture that emerges is that except for the North, the rebels were either routed or were the victims of vacillation, and upon the surrender of authority to Lt.-Col. Hassan Katsina - appointed Military Governor of the North by

General Ironsi - by Major Nzeogwu, the inchoate rebellion was completely crushed.

However, let us revert to the speech made by Major Nzeogwu over Radio Kaduna on January 15, 1966. It is noticed that although he had effective control only over Northern Nigeria he spoke of the Supreme Council of the Revolution of the Nigerian Armed Forces, thus implying that that Council was to govern Nigeria as a whole. Somewhat incongruously, he suspended only the Constitution of the Northern Region. By implication he preserved intact the remaining three regional constitutions as well as the federal constitution. Again, why was martial law only declared over Northern Nigeria? It is no answer to say that this was because he controlled only Northern Nigeria because phrases like "every Nigerian" and "our country's territorial integrity" as well as "the duties of national integration" suggest powerfully that he spoke as if he possessed the authority to govern, even if he had not the power to enforce his words in relation to, the whole of Nigeria. He clearly purported to introduce a new legal order in Nigeria because although he permitted the Permanent Heads of the Civil Service as well as the Chairman of Public Corporations to make decisions that would not have contradicted the wishes of the Supreme Council, he stressed that the authority exercised over these men by their political superiors (i.e. Ministers and their Parliamentary Secretaries) was to be abrogated forthwith. The Civil Service was thus to have a new master - the Supreme Council. The context

in which the Civil Service is mentioned suggests that he was referring to the Civil Service at both federal and regional levels. This makes his selective suspension of the Northern Region's Constitution even more mystifying.

Another feature that is seen in his speech is the gravamen of corruption and gross inefficiency he so passionately felt against the politicians. The coup was proclaimed as the precursor to a massive purge of all corrupt and inefficient elements that were guilty of having "put the Nigerian political calendar back". Clean and efficient administration was to be the hallmark of the new legal order. He gave, however, no indication as to whether the federal structure was an item of the wastage which he so fiercely condemned. We do not intend to go deeper into his statement since he never actually had the chance to govern Nigeria. It would be more meaningful to discuss the Ironsi regime; Major Nzeogwu had control of the North for less than forty-eight hours.

Clearly federal government could not have continued to function as it had done before the convulsive occurrences of January 15. General Ironsi had warned the remaining federal Ministers that the loyalty of the army could not be assured if the federal ministers decided to retain the authority they had up till then exercised.²¹ Also, owing to the absence of a quorum, the Deputy Speaker (the Speaker himself having been absent) had on that turbulent day

21. Kirk-Greene, op.cit., vol. 1, p.36.

adjourned the House of Representatives. The latter event precluded the passing of emergency legislation in terms of S.70 of the 1963 Republican Constitution because emergency measures, according to that Constitution, had to have the legislative approval of Parliament. The federal executive had no independent emergency powers.

It is significant that the remaining federal ministers had to meet at Police Headquarters to discuss the situation, with General Ironsi presumably in attendance. This unedifying gathering at Lagos hardly evokes the impression of a functioning Council of Ministers in effective and cool deliberation, a picture of constitutional immaculacy which subsequently both the Acting President and General Ironsi endeavoured to portray in their effort to assert the legality of the purported transfer of power to the military which followed this hectic consultation. This consultation (popularly termed a Cabinet meeting) was chaired by the most senior federal Minister remaining, Alhaji Zanna Bukar Dipcharima.²² But beyond the fact that he did not take the chair as Prime Minister of the Federation it is not known in exactly what capacity he had assumed the authority to preside. It is evident that although he might have been acceptable to the remaining federal ministers as ad hoc chairman of the meeting because of his seniority among them, this de facto acquiescence occupies no obvious constitutional niche. General Ironsi, then still only G.O.C. of the Nigerian Army, had requested if not requisitioned this

22. Kirk-Greene, op.cit., vol.1, p.36.

gathering of Ministers to appoint a Deputy Prime Minister who would then, so the General thought, have the authority to issue orders to (as distinct from transferring the totality of the powers of the federation to) the army.²³ The Ministers were unable to agree on who such a person should be. This failure to elect someone to give orders to the army resulted in General Ironsi's demand that authority should then be vested in the armed forces with him as Supreme Commander: someone had to control the situation, and if the civilian government were unable to produce such a person the military authority should logically take over from the indecisive Ministers.

On January 16, one day after the rebellion, the Acting President (President Azikwe was away in the United Kingdom) broadcast the following message to the nation:²⁴

I have tonight been advised by the Council of Ministers that they had come to the unanimous decision voluntarily to hand over the administration of the country to the Armed Forces of the Republic with immediate effect.

All Ministers are assured of their personal safety by the new administration. I will now call upon the General Officer Commanding, Major-General Aguiyi Ironsi, to make a statement to the nation on the policy of the new administration.

It is my fervent hope that the new administration will ensure the peace and stability of the Federal Republic of Nigeria and that all citizens will give them their full co-operation.

23. Kirk-Greene; p.36.

24. Government Notice No. 147/1966

The Acting President thus purported to transfer the administration of the country to the Armed Forces. It should not go unnoticed that the federal cabinet (even assuming that the group of Ministers had validly acted as such) was only the executive authority of government at the federal level, and could not also transfer the legislative authority of the Federal Parliament as well as the executive and legislative authority possessed by all the four Regions to the Armed Forces. It is not clear whether or not the phrase "the administration of the country" was wide enough to embrace the Federal and Regional judicial power. Prima facie the phrase should be attributed this inclusive import because the administration of a country must mean the control of all its institutions, the exclusion from which of the judiciary would appear anomalous. All this, of course, assumes the legal efficacy of the transfer, an issue that will be scrutinised in the next chapter.

That the transfer was not a halcyon affair is betrayed by the fact that the Acting President felt it necessary in his broadcast to assure the Ministers of the defunct regime that they need not fear for their personal safety. There was therefore more than a hint that the Ministers' purported transfer had not been made as voluntarily as the Acting President had maintained in his speech.

Major-General Ironsi spoke to the nation immediately after the Acting President:²⁵

25. Government Notice No. 148/1966: Kirk-Greene; Doc.No.4, Vol.1.

The Government of the Federation having ceased to function, the Nigerian armed Forces have been invited to form an Interim Military Government for the purposes of maintaining law and order, and of maintaining essential services.

This invitation has been accepted, and I, General J.T.U. Aguiyi-Ironsi, the General Officer Commanding the Nigerian Army, have been formally invested with authority as Head of the Federation Military Government, and Supreme Commander of the Nigerian Armed Forces.

The General then proceeded to give general directions as to the government of the country:

SUSPENSION OF CERTAIN PARTS OF THE CONSTITUTION

The Federation Military Government hereby decrees:

- a. the suspension of the provisions of the Constitution of the Federation relating to the office of President, the establishment of Parliament, and of the office of Prime Minister;
- b. the suspension of the provisions of the Constitutions of the Regions relating to the establishment of the offices of Regional Governors, Regional Premiers and Executive Councils, and Regional Legislatures.

APPOINTMENT OF REGIONAL MILITARY GOVERNORS

The Federation Military Government further decrees:

- a. that there shall be appointed a Military Governor in each Region of the Federation, who shall be directly responsible to the Federation Military Government for the good government of the Region;
- b. the appointment as Adviser to the Military Governor of the Region, of the last person to hold the office of Governor of the Region under the suspended provisions of the constitution.

THE JUDICIARY, THE CIVIL SERVICE AND THE POLICE

The Federation Military Government further decrees:

- a. that the Chief Justice and all other holders of judicial appointments within the Federation shall continue in their appointments, and that the judiciary generally shall continue to function under their existing statutes;

b. that all holders of appointments in the Civil Service of the Federation and of the Regions shall continue to hold their appointments and to carry out their duties in the normal way, and that similarly the Nigeria Police Force and the Nigeria Special Constabulary shall continue to exercise their functions in the normal way;

c. that all Local Government Police Forces and Native authority Police Forces shall be placed under the overall command of the Inspector-General.

INTERNAL AFFAIRS POLICY

The Federation Military Government announces, in connection with the internal affairs of the Federation:

- a. that it is determined to suppress the current disorder in the Tiv area of the Northern Region;
- b. that it will declare Martial Law in any area of the Federation in which disturbances continue;
- c. that it is its intention to maintain law and order in the Federation until such time as a new Constitution for the Federation, prepared in accordance with the wishes of the people, is brought into being.

EXTERNAL AFFAIRS POLICY

The Federation Military Government announces, in connection with the external affairs of the country:

- a. that it is desirous of maintaining the existing diplomatic relations with other States; and
- b. that it is its intention to honour all treaty obligations and all financial agreements and obligations entered into by the previous Government.

CITIZENS TO CO-OPERATE

The Federation Military Government calls upon all citizens of the Federation to extend their full co-operation to the Government in the urgent task of restoring law and order in the present crisis, and to continue in their normal occupations.

It should be immediately noticed that although General Ironsi suspended the organs which under the 1963 Constitution had exercised legislative and executive authority at both federal and regional levels, he specifically confirmed the hierarchy of the courts as well as the incumbents of that constitutional institution. We shall examine in the next chapter the question whether or not this part of the statement of General Ironsi was prescriptive or merely descriptive of the constitutional position. If it was prescriptive then the judiciary functioned only because General Ironsi empowered it to function and therefore not only the legislative and executive, but also the judicial, powers of government were vested in the Military Government which could then manipulate any of these powers in any manner it thought best. However, if the part of the statement relating to the judiciary was merely descriptive then the judiciary functioned not because it was authorised by the Military to do so, but because the accession of the Military did not involve the transfer of the judicial power to the armed forces. The fact that General Ironsi had expressed in the speech of accession that the judiciary was to continue, was to give rise four years later (April, 1970) to litigation in the Supreme Court of Nigeria concerning the source of the authority that the judiciary was exercising.²⁶

26. Lakanmi and Ola v. A.G. for the Western State
(April, 1970); see below, chapter 3.

(3) Military Government

At this point it is proposed to describe the type of government which superseded the legislative and executive organs of the country at both federal and regional levels. The new structure at the federal level (assuming that the federal nature of the Nigerian body politic survived the accession of the military) will be considered first. The Federal Cabinet and Parliament were replaced by the Federal Executive Council and the Supreme Military Council.²⁷ But whereas the Federal Cabinet had independent executive authority under the 1963 Constitution, the Federal Executive Council of the Military Government enjoys only delegated executive authority because the original executive authority vests in the Head of the Federal Military Government.²⁸ But again the executive authority vested in the Head of the Federal Military Government comprises the sum total of executive authority in the country, as distinct from that enjoyed by the Federal Cabinet which did not extend beyond federal matters as defined in the Constitution. Such executive authority as a Military Governor exercises over his Region is delegated to him by the Head of the Federal Military Government; previously the extent of executive authority of a Regional government was defined in the Constitution, and exercised as original authority.²⁹

27. Decree No. 1, 1966, S.8.

28. Decree No. 1, 1966, S.7.

29. S. 7(3), Decree No. 1, 1966.

The Supreme Military Council, though it is defined in terms of personnel rather than in terms of the authority it is competent to exercise³⁰, is that limb of the Federal Military Government that possesses the legislative authority to make any law whatsoever relating to the peace, order and good government of Nigeria or any part thereof.³¹ The Federal Military Government is nowhere defined and it must therefore be presumed to consist of the Head of the Federal Military Government (defined as the Supreme Commander of the Armed Forces of the Federal Republic of Nigeria³²), and the Supreme Military Council. It is interesting to note that the personnel in the Supreme Military Council and the Federal Executive Council, as these are defined in Decree No. 1, 1966, are identical except that the four military governors are the only members of the Supreme Military Council who are not also members of the Federal Executive Council, and that the only members of the latter who are not members of the former are the Inspector-General and Deputy Inspector-General of the Nigeria Police.³³

We will now assess the structure of government in the four Regions. (The discussion is based on the position on January 17, 1966, when Decree No. 1, which established the structure of the Military Government, came

30. S. 8(2), Decree No. 1, 1966.

31. S. 3(1), Decree No. 1, 1966.

32. S. 16, Decree No. 1, 1966.

33. S. 8(2), Decree No. 1, 1966.

into effect.) The Legislative authority of the Military Governor in a Region (this office has never been legislatively defined) is covered in S. 3(2) and (3) of Decree No.1, 1966 which read:

S. 3(2) The Military Governor of a Region -

(a) shall not have power to make laws with respect to any matter included in the Exclusive Legislative List³⁴; and

(b) except with the prior consent of the Federal Military Government, shall not make any law with respect to any matter included in the Concurrent Legislative List. ³⁵

S. 3(3) Subject to subsection (2) above and to the Constitution of the Federation³⁶, the Military Governor of a Region shall have power to make laws for the peace, order and good government of that Region.

The laws which the Military Governor of a Region is permitted to make cannot, however, prevail over an Act of Parliament made before January 16, 1966, or a decree of the Federal Military Government made then or thereafter, and such laws made by the Military Governor of a Region shall be void to the extent of any inconsistency with the superior laws.³⁷

34. i.e. the Exclusive Legislative List in the 1963 Federal Constitution.

35. i.e. the Concurrent Legislative List in the 1963 Federal Constitution.

36. i.e. the 1963 Federal Constitution which made Nigeria a Republic.

37. S. 3(4), Decree No. 1, 1966.

The executive authority of a Military Governor is delegated, not original. This is because the executive authority of the entire Nigerian body politic vests in the Head of the Federal Military Government³⁸ and the executive authority that a Military Governor exercises is only that which has been delegated to him by the Head of the Federal Military Government³⁹, such authority being revocable by the latter in his absolute discretion.⁴⁰ However, a Military Governor is deemed, as from January 17, 1966, to have been delegated the executive authority possessed by his Region immediately before January 16, 1966, but this deeming provision does not impair the right of the Head of the Military Government to vary or revoke such authority.⁴¹

We shall now examine the manner in which the legislative authority of the Military Government is exercised. This matter is prescribed by Decree No. 1, 1966, which provides as follows. The Federal Military Government's power to legislate is to be expressed through Decrees signed by the Head of the Federal Military Government. S. 4(1) of the Decree states:⁴²

The power of the Federal Military Government to make laws shall be exercised by means of Decrees signed by the Head of the Federal Military Government.

38. S. 7(1) and (2), Decree No. 1, 1966.

39. S. 7(3), Decree No. 1, 1966.

40. S. 7(5), Decree No. 1, 1966.

41. S. 7(4), Decree No. 1, 1966.

42. S. 4(1), Decree No. 1, 1966.

A decree means an instrument⁴³ made by the Federal Military Government and expressed to be, or to be made as, a decree. S. 16 of Decree No. 1 prescribes:⁴⁴

In this Decree, and in any other law -

'Decree' means an instrument made by the Federal Military Government and expressed to be, or to be made as, a decree;

The validity of a Decree is not to be questioned by any court of law in Nigeria. S. 6 of Decree No. 1 asserts:⁴⁵

No question as to the validity of this or any other Decree or of any Edict shall be entertained by any court of law in Nigeria.

The Federal Military Government has purported to ensure the supremacy of its decrees by purporting to amend S. 1 of the 1963 Constitution so that, after this "amendment", the section is made to abrogate its former prerogative of paramountcy in these words:⁴⁶

This Constitution shall have the force of law throughout Nigeria and, if any other law (including the Constitution of a Region) is inconsistent with this Constitution this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void. Provided that this Constitution shall not prevail over a decree, and nothing in this Constitution shall render any provision of a Decree void to any extent whatsoever.⁴⁷

43. The word is not defined in the Decree.

44. S. 16, Decree No. 1, 1966.

45. S. 6, Decree No. 1, 1966.

46. Schedule 2, read with S. 1(2), Decree No. 1, 1966, "amending" S. 1 of the 1963 Constitution.

47. My own emphasis.

The legislative power vested in a Military Governor (the office is inexplicably nowhere defined) is to be exercised by means of Edicts signed by him.

S. 4(2) of Decree No. 1 provides:⁴⁸

The power of the Military Governor of a Region to make laws shall be exercised by means of Edicts signed by him.

An Edict is defined by S. 16 of Decree No. 1 as follows:⁴⁹

In this Decree, and in any other law -

.....
'Edict' means an instrument⁵⁰ made by the Military Governor of a Region and expressed to be, or made as, an edict;

The validity of an Edict is not to be impugnable in any court of law in Nigeria.⁵¹

In the context of legislative power it is distinctly discernible that whereas the legislative authority in a Region is vested in its Military Governor,⁵² legislative authority in respect of the whole country is not vested in the Head of the Federal Military Government but in the Federal Military Government itself⁵³, showing that the Head of the Military Government does not possess an independent legislative authority, although he is apparently allowed to

48. S. 4(2), Decree No. 1, 1966.

49. S. 16, Decree No. 1, 1966.

50. This word is not defined in the Decree.

51. S. 6 of Decree No. 1, 1966.

52. S. 4(2) of Decree No. 1, 1966, begins: "The power of the Military Governor of a Region to make laws.....". (The underlining is mine.)

53. S. 4(1) of Decree No. 1, 1966, begins: "The power of the Federal Military Government to make laws". (The underlining is mine.)

exercise⁵⁴ that authority on the Military Government's behalf. The Decree itself is obmutescent on the circumstances in which, and the procedure subject to which, he can exercise the legislative power on behalf of the Military Government by signing the instrument of Decree. The definitive Decree (i.e. Decree No. 1, 1966) would apparently allow the Head of the Military Government to issue decrees as he chooses, including a decree abolishing Decree No. 1 itself and making himself an absolute authority.

Another noteworthy feature is that Decree No. 1, 1966, the first legislative measure of the Federal Military Government, was enacted with retroactive effect: it was not signed until March 4, 1966 but it took effect as from January 17, 1966.

A difficult question is whether or not the government of Nigeria has been able to retain its federal structure after the coup of January 15, 1966. Prima facie it would seem that that event has transformed the country into a unitary state, because the centre has been invested, in terms of Decree No. 1, 1966, with absolute legislative and executive authority. Such authority as the Regions exercise is strictly subordinate: their legislative authority can be overridden by the Centre, and their executive authority is delegated from, and revocable by, the Centre. No composite territorial entity can qualify to be a federation unless its constituent units enjoy some

54. S. 4(1) of Decree No. 1, 1966, continues: "...shall be exercised by means of Decrees signed by the Head of the Federal Military Government". (My own underlining.)

measure of independent and invidable authority, as distinct from being allowed autonomy that is revocable by the Centre.

In defining a federal structure Professor K.C. Wheare in his classic work says:⁵⁵

Federal government exists when the powers of government for a community are divided substantially according to the principle that there is a single independent authority for the whole area in respect of some matters and that there are independent regional authorities for other matters, each set of authorities being co-ordinate with and not subordinate to the others within its own prescribed sphere. 56

It is proposed to make one final point on the constitutional changes precipitated by the accession of the military in Nigeria. The suspension of certain parts of both the Federal and the Regional Constitutions announced in Major-General Ironsi's speech of accession was confirmed by Decree No. 1, 1966. The sections of these constitutions not suspended have been allowed to continue to have effect subject, of course, to necessary modifications (into the minutiae of which it is not proposed to delve).⁵⁷ These remaining provisions, however, are expressed to be subject to the authority of Decrees though not so subject to Edicts. It is thus evident that from the viewpoint of the military all the five constitutions are subservient to its administration. The constitutions are treated as being of service in that they provide a malleable framework of law,

55. Federal Government; by K.C. Wheare; O.U.P. 1963 (fourth edition); p.35.

56. The underlining is mine.

57. S. 1(2), S. 2(2), Decree No. 1, 1966.

with malleable as the operative word. In the next chapter we shall see how the Supreme Court was to dispute this cavalier posture four years later.⁵⁸

(4) Events Precipitating the Coup of July, 1966

What was to happen to Nigeria now that the Military had taken over the administration of the country? Did the Military desire tight central control or were the regional Military governors to have their share of authority increased? An indication of what was to happen can be seen in a broadcast to the nation made by General Ironsi in the month of the coup (the broadcast was made on January 28, 1966). Part of what he had to tell the nation was this:⁵⁹

.....All Nigerians want an end to Regionalism. Tribal loyalties and activities which promote tribal consciousness and sectional interests must give way to the urgent task of national reconstruction. The Federal Military Government will preserve Nigeria as one strong nation. We shall give firm, honest and disciplined leadership.

This was a clear caveat to those who favoured the augmentation of regional authority to desist from their efforts. The view may be ventured that the General was perhaps being unconsciously Procrustean in that instead of attempting to reconcile regional differences he was simply

58. Lakanmi and Ola v. The Attorney-General for the Western State (1970).

59. Kirk-Greene, Vol. 1, Doc. 16, p. 154.

declaring that he proposed to ignore them. In view of the state of the country before the coup, it does not require imagination to surmise that the speech must have left some of its listeners not a little disconcerted.

On February 21, 1966, at a Press Conference⁶⁰ the General reiterated:

On the question of the political future of the country, the experiences and mistakes of the previous Governments in the Federation have clearly indicated that far-reaching constitutional reforms are badly needed for peaceful and orderly progress towards the realisation of our objectives. I have already touched on some of the major issues involved in my recent broadcast to the nation. It has become apparent to all Nigerians that rigid adherence to 'Regionalism' was the bane of the last regime and one of the main factors which contributed to its downfall. No doubt, the country would welcome a clean break with the deficiencies of the system of Government to which the country had been subjected in the recent past. A solution suitable to our national needs must be found. The existing boundaries of Governmental control will need to be re-adjusted to make for less cumbersome administration.

Earlier in the month, on February 12, 1966, the General had set up the Nwokedi Commission⁶¹ to devise an administrative structure for a united Nigeria and to consider the merits of unifying the five public services (or the Federal Government and the four Regions).

In March, 1966, General Ironsi set up a Constitutional Review Group⁶² to examine, inter alia, the merits

60. Kirk-Greene, Vol. 1, Doc. 17, p. 155, at p. 157.

61. Kirk-Greene, Vol. 1, p. 43.

62. Kirk-Greene, Vol. 1, p.158, Doc. 18.

and demerits of unitary and federal forms of government for Nigeria.

On May 24, 1966, General Ironsi made a very important broadcast over the national radio. As this speech was to cause rioting in the Northern Region, it is proposed to quote parts of it. The General said:⁶³

It is now three months⁶⁴ since the Government of the Federal Republic of Nigeria was handed over to the Armed Forces. Now that peace has been restored in the troubled areas it is time that the Military Government indicates clearly what it proposes to accomplish before relinquishing power. The removal of one of the obstacles on the way is provided for in the Constitution (Suspension and Modification) Decree (No. 5) 1966⁶⁵ which was promulgated by me today and comes into effect at once.

The provisions of the Decree are intended to remove the last vestiges of the intense regionalism of the recent past, and to produce that cohesion in the governmental structure which is so necessary in achieving, and maintaining the paramount objective of the National Military Government, and indeed of every true Nigerian, namely, national unity.

The highlights of this Decree are as follows:
The former regions are abolished, and Nigeria grouped into a number of territorial areas called provinces.....

Nigeria ceases to be what has been described as a federation. It now becomes simply the Republic of Nigeria.

The former Federal Military Government and the Central Executive Council⁶⁶ become respectively the National Military Government and the Executive Council. All the Military Governors are members of the Executive Council.

63. Kirk-Greene, Vol. 1, Doc. 26, p. 174.

64. Four months? (Jan.-May, 1966).

65. Decree No. 34, 1966.

66. The Federal Executive Council?

A Military Governor is assigned to a group of provinces over which and subject to the direction and control of the Head of the National Military Government, he shall exercise executive power. In order to avoid any major dislocation of the present administrative machinery, the grouping of the provinces has been made to coincide with the former regional boundaries. This is entirely a transitional measure and must be understood as such. The present grouping of provinces is without prejudice to the Constitutional and Administrative arrangements to be embodied in the New Constitution in accordance with the wishes of the people of Nigeria. 67

The National Military Government assumes the exercise of all legislative powers throughout the Republic subject to such delegations⁶⁸ to Military Governors as are considered necessary for purposes of efficient administration.

This Decree⁶⁹ also banned political organisations and all political activities (whether these be party political or tribal political). A number of people in the Northern Region saw this move as uniting Nigeria under Ibo (the tribe or race to which General Ironsi belonged) domination. On May 29, 1966, five days after General Ironsi's broadcast, there was rioting in certain areas of the Northern Region, forcing the Military Governor of the Northern Group of Provinces (the Northern Region) to address the people there through Kaduna Home Service. Part of the speech, made by Lieut.-Col. Hassan Katsina on the evening of the day of the outbreaks of violence, reads thus:⁷⁰

67. The underlining is my own.

68. The underlining is my own.

69. Decree No. 34, 1966.

70. Kirk-Greene, Vol. , Doc. 27, p. 177, at p. 178.

I..... want to remind you, fellow citizens, that the Supreme Commander has made it perfectly clear that the measures introduced are interim and temporary until civilian administration is once again restored. We in the Army have got a unified command and it is the method we are used to. We believe that, if we are to carry on this holding operation until the return of civilian rule, we have got to work with the method we are used to. 71

The Supreme Commander has said that this is an interim arrangement merely for the army to work under methods it is used to. The permanent arrangements for the Government of Nigeria cannot be made without the fullest consultations with the people. As you all know, the Government has appointed a number of study groups to make recommendations on various aspects of government. These study groups are still working and our decisions on the future of the government and its institutions will depend on the recommendations of these bodies if they are found to be acceptable to the people. We will not for one moment impose a permanent system which is not acceptable to the majority of the people.

But the riots did not subside. The next day (May 30) the Military Governor of the North ordered troops into Kaduna with instructions to shoot rioters on sight.⁷² Calm was partially restored on 31, May. But the calm was not only incomplete but uncertain.

On July 13, 1966, General Ironsi announced that the four Military governors were to hold office on a rotating basis.⁷³ Subsequent to this announcement General Ironsi went on a tour of the country. On July 28, 1966, he addressed the National Conference of Traditional Rulers at Ibadan. This was the day before the July coup (July 29).

71. The underlining is my own.

72. Kirk-Greene, Vol. 1, p. 49.

73. Kirk-Greene, Vol. 1, p. 52.

His decision to rotate the Governors was generally welcome in the South but treated with suspicion in the North.

(5) The Coup of July, 1966⁷⁴

On the night of July 28, 1966, the Head of the Federal Military Government was the guest of the Military Governor of the Western Group of Provinces, Lt.-Col. Fajuyi. The coup began in Abeokuta⁷⁵ when certain Northern soldiers shot and killed three of their Ibo officers.⁷⁶ The mutiny (for at that stage it could only have been such) spread to the barracks at Ibadan and thence to those at Ikeja (the battalion for Lagos). The latter seized Ikeja airport. General Ironsi's bodyguard had been removed by midnight. The mutinous troops surrounded Government Lodge that night. The next morning (July 29) they were led by a Major Danjuma to arrest (or kidnap - depending on whether the mutiny had by then matured into a coup) General Ironsi and Lt.-Col. Fajuyi. The detained leaders were led into waiting police vehicles. (In the evening there was the killing of Ibo officers in the Northern Region and the Eastern Region by their non-Ibo subordinates. The Federal Government which succeeded the Ironsi regime did not order an investigation into these events and there is therefore no authoritative account of what actually happened.⁷⁷) We will

74. Ruth First, op.cit., pp. 313-322.

75. A town in the Western Region.

76. First, p. 315.

77. First, p. 316.

not concern ourselves with the cloak-and-dagger melodrama that followed the abduction of General Ironsi (whose subsequent assassination that day was not to be officially announced until January, 1967). Suffice it to note that Lt.-Col. Gowon, Chief-of-Staff of the Nigerian Army, was purportedly made the new Supreme Commander of the Armed Forces by a majority decision of those members of the Supreme Military Council who had survived the coup.⁷⁸ Lt.-Col. Ojukwu, Military Governor of Eastern Nigeria, was not among the approving majority: in fact it is agreed that as to the new appointment he was not even consulted. The Eastern Governor was punctilious in his refusal, then as well as subsequently, to acknowledge Lt.-Col. Gowon as Nigeria's new Head of the Military Government.

In his speech of accession, Lt.-Col. Gowon, like Major-General Ironsi before him, was eager to give the impression of legal continuity. He certainly did not regard his succession to General Ironsi as constituting the introduction of a new political order. That continuity was the theme of his administration is apparent from the following extract from his speech:⁷⁹

...I have been brought to the position today of having to shoulder the great responsibilities of this country and the armed forces with the consent of the majority of the members of the Supreme Military Council as a result of the unfortunate incident that occurred on the early morning of 29th July 1966.

78. First, op.cit., p. 320.

79. Kirk-Greene, p. 196, Doc. 37.

It is clear that he regarded himself as being elected by that authority - the Supreme Military Council - which had ruled Nigeria continuously from January, 1966. Furthermore, he did not treat the abduction of General Ironsi as having in any manner affected the authority of the existing organs of government. What happened on that momentous day was deliberately not described as a coup.

He also agreed with what General Ironsi had maintained when he had been given the reins of supreme authority, that the Military administration that emerged in January was not a revolutionary government. Lt.-Col. Gowon continued:

....I would like to recall to you the sad and unfortunate incidents of 15th January 1966..... a group of officers decided to overthrow the legal government of the day; but their efforts were thwarted by the inscrutable discipline and loyalty of the great majority of the Army and the other members of the armed forces and the police. The Army was called upon to take up the reins of government until such time that law and order had been restored.

If both General Ironsi and Lt.-Col. Gowon were right about continuity (the issue is to be taken up in the next chapter) then the cataclysmic events in January and July were not revolutionary in character.

One inescapable point is that whereas General Ironsi had in January treated the mutineers as rebels and had specifically referred to them as such, Lt.-Col. Gowon in August had merely spoken of killing and kidnapping by certain soldiers, having studiously fought shy of the word "mutineers". Lt.-Col. Gowon did not regard what happened in

July as an attempted rebellion. As far as he was concerned his legal position would not have been any different had General Ironsi been killed in an earthquake or had simply disappeared without trace.

The events on July 29, 1966 were, however, seen very differently from the stance of the Military Governor of Eastern Nigeria. He regarded the events from the inception of the mutiny to the purported appointment of Lt.-Col. Gowon as a rebellion. He regarded the subsequent restoration of order by Lt.-Col. Gowon as a ceasefire agreement dictated by the rebels.⁸⁰ He treated Lt.-Col. Gowon's speech of accession earlier on that same day (August 1, 1966) as merely an announcement that the country was then sufficiently calm for immediate negotiations to allow the people of Nigeria to determine the form of their future association.

One of the most important acts of the new Supreme Commander (his position will for the moment be assumed) was to repeal Decree No. 34, 1966, which had made Nigeria a unitary state. The "federal" structure as defined in Decree No. 1, 1966 (which we have already examined in some detail) was restored. The enabling and repealing Decree was Decree No. 59, 1966.

80. Kirk-Greene, Vol. 1, Doc. 38, p. 198.

(6) The Meeting at Aburi in Ghana from January 4 to
January 5, 1967

The dissension between the Eastern Region and the rest of Nigeria persisted. In January, through the good offices of the government of Ghana, the members of the Nigerian Supreme Military Council (of which the membership of the Eastern Governor was not disputed by anyone) met at Aburi to discuss the deteriorating situation and to resolve the issue of leadership. It is only on the latter that we propose to concentrate because it concerns the question of legal authority in the government of Nigeria. Unfortunately the problem over who should govern Nigeria as Supreme Commander was not resolved. The failure is apparent from the Minutes of the Meeting,⁸¹ the relevant section of which reads:⁸²

The question of the non-recognition by the East of Lt.-Col. Gowon as Supreme Commander and Head of the Federal Military Government was also exhaustively discussed. Lt.-Col. Ojukwu based his objection on the fact, inter alia, that no one can properly assume the position of Supreme Commander until the whereabouts of the former Supreme Commander, Major-General Aguiyi-Ironsi, was known. He therefore asked that the country be informed of the whereabouts of the Major-General and added that in his view, it was impossible, in the present circumstances, for any one person to assume any effective central command of the Nigerian Army.

Regarding the future of the Federal Military Government, the Minutes read:⁸³

81. Kirk-Greene, Col. 1, Doc. 80, p. 315.

82. Kirk-Greene, p. 317.

83. Kirk-Greene, p. 318.

..... Members agreed that the legislative and executive authority of the Federal Military Government should remain in the Supreme Military Council to which any decision affecting the whole country shall be referred for determination provided that where it is not possible for a meeting to be held the matter requiring determination must be referred to Military Governors for their comment and concurrence.

The last sentence in the quotation above is ambiguous. Does "for their.....concurrence" simply mean that this was to ascertain whether or not the Military Governors agreed, or is it meant to confer on each of the Military Governors a veto power over matters of national concern?

In favour of the first interpretation is the point that this reference of matters to absent Military Governors was to make sure that on all issues of national import their views should not be ignored through their merely being absent. Also, the Minutes stated that authority was to REMAIN in the Supreme Military Council. Since right up to the time of the Aburi Accord such authority did not require the unanimous assent of the Council's members for its exercise, the case for the practice of majority rule persisting into the proposed national structure of government is strengthened. However, it must be remembered that the Governor of the Eastern Region was anxious that his Region should not be dominated by the rest of the country, and this fact argues in favour of a veto power being meant to be conferred on the Military Governors.

We are aware that we have only touched on one of the many aspects of the discussion at Aburi, but from the point of view of ascertaining the source of legal authority in Nigeria the aspect touched on is the only relevant one that can be found in that military confabulation.

(7) The Civil War - July, 1967 to January, 1970

After the meeting at Aburi, the two factions found themselves in profound disagreement over what they had thought they had agreed to. There was a mounting probability that the Eastern Region would attempt to secede. On March 19, 1967, Lt.-Col. Gowon passed Decree No. 8 (1967). This Decree was claimed by the Supreme Commander as having decentralized Nigeria in comparison with the position established by Decree No. 1, 1966. Whether or not there was such decentralization, the fact remains that this measure did not appease the Military Governor of the Eastern Region. The details of the Decree need not detain us because although it gave more power to the Regions it did not alter the fact that the Centre was supreme in that it could revoke whatever authority the Regions had.

On May 27, 1967, Lt.-Col. Gowon promulgated Decree No. 14, 1967, dividing Nigeria's four Regions into twelve states, each to be governed by a Military Governor. On the same day the decentralization introduced by Decree No. 8 (1967) was repealed by Decree No. 13 (1967) thus restoring the position established by Decree No. 1, 1966.

Three days later (May 30, 1967) the Eastern Region of Nigeria purported to secede from the rest of the country. Civil War did not commence forthwith. It began on July 6, 1967 and did not end until January 15, 1970.⁸⁴ The cataclysm precipitated by the Civil War and the ineffable suffering consequent thereon transcend the minute compass of purely legal issues. In the next chapter we shall be principally concerned with the legal implications of the coups in January and July, 1966.

84. Kirk-Greene, Vol. 2, Doc. No. 227, p. 457.

CHAPTER 3THE JUDICIAL RESPONSE

Since the Nigerian Constitution of 1963 made no provision for the assumption of power by a military government, it is hardly surprising that the military government's source of authority should be challenged. We have noted that upon the disruption of civilian government in consequence of the assassination of ministerial and military dignitaries, a group of Ministers in the Council of Ministers assembled at the Police Headquarters in Lagos, and endeavoured to concert measures to resolve the resulting crisis of authority. This cadre of Ministers had purported to meet as the Council of Ministers. In pursuance of this purported capacity they then proceeded to remit not only the authority of the Council of Ministers, but the powers of government, in their totality at both the federal and regional levels, to an administration of military men referred to as the Federal Military Government, with the former General Officer Commanding in the Army being appointed not only as Head of the Federal Military Government but also as Supreme Commander of Nigeria's Armed Forces.

Addressing himself to this situation, Professor T.O. Elias has offered us this critique:¹

1. (1971) The Nigerian Law Journal p.129, at p.130. (Prof. Elias was appointed the Chief Justice of the Supreme Court of Nigeria in April 1972.)

As early as 1967 Prof. Elias had maintained that the Military Government in Nigeria was the unquestioned successor to the civilian government under the 1963

/continued...

.....at the fateful meeting between the soldiers and certain Federal Ministers on the night of January 16, 1966, the latter were told that it had been decided that the military must take over the reins of government, and they were assured of their personal safety in returning to their homes in due course. The hurriedly summoned group of Ministers did not constitute the Cabinet in the absence of either the Prime Minister or an acting Prime Minister, who alone could then have convened a valid Cabinet meeting. But, even if there had been a duly appointed Head of Government, neither he nor the Cabinet could have lawfully transferred power to the military or to anyone else, since there was (and there is still) no provision for any transfer of power under the Constitution of 1963. At such a point where a duly elected government decides to give up, there must be an appeal to the electorate.

Professor T.O. Elias believes that the supreme law in Nigeria is Decree No. 1, 1966. He is unshakeably convinced that the military in Nigeria are in no way subordinate to the 1963 Constitution from which, as Professor Elias contends in the passage immediately above, they did not derive the authority they came to wield. Speaking of the military takeover in January, 1966, Professor Elias asserts:²

Footnote 1 continued...

Constitution. He was clearly of the opinion that the Military Government was supreme and not subject to the 1963 Constitution. See NIGERIA: by T.O. Elias: London (1967): Chapter 24, especially p. 457. Furthermore, Professor Elias was Attorney-General under both the civil and military governments, and must have assisted in the drafting of the military decrees.

2. Elias, op.cit., pp. 129-130.

The basic constitutional instrument of the military regime is and remains the Constitution (Suspension and Modification) Decree No. 1 1966 made by the Military Government which, in reaffirming the Constitution of 1963, provides that it must 'not prevail over a Decree' or 'render any provision of a Decree void to any extent whatsoever', and that no court of law can entertain any question as to the validity of any Decree or Edict. The Federal Military Government, once in power by the coup of January 15, 1966, could have done any one of three things: (i) set aside the Constitution of 1963 entirely and replace it by another; (ii) amend it to suit the new situation; or (iii) rule without any Constitution whatsoever. In the event, it chose (ii).

The Lakanmi case³

We have had the learned comments of Professor Elias; we shall now compare them with the views of the Supreme Court⁴ of Nigeria which ~~was~~^{were} expressed in Lakanmi and Ola v. The Attorney-General (West).

We have noted that a Military Governor could legislate by means of edicts. In pursuance of this power the Military Governor of the Western State promulgated in April 1967, Edict No. 5 of that year. This Edict provided for the investigation of the assets of Public Officers and other persons. Prior to this Edict, however, the Federal Military Government had in June, 1966, enacted a Decree for the investigation of the assets of Public Officers (Decree No.51,

3. 1970 S.C. 58/69. The case is unreported and the quotations from it are taken from a copy of the transcript of the judgment, which was delivered in April, 1970.

4. Since Professor Elias is now the Chief Justice of Nigeria it is interesting to speculate on whether or not the views of the Supreme Court have now changed.

1966). The two enactments conflicted in their terms. The appellants before the Supreme Court had therefore initially appeared before the High Court (West) to contend that Edict No. 5 was inoperative because its terms were incongruent with those embodied in a decree.

The appellants before the Supreme Court were appealing against the decision of the Western State Court of Appeal which had affirmed the decision of the High Court which had dismissed their appeal against the Order⁵ made against them by the Tribunal of Inquiry established under the authority of S.3 of Edict No. 5, 1967, of the Western State.

The High Court had dismissed their appeal against the Order of the Tribunal of Inquiry because S.21 of Edict No. 5 (1967 - West) had provided against judicial review of orders made by the Tribunal in question.

The Western State Court of Appeal had in its turn dismissed the appeal from the High Court because Decree No. 45 (enacted in August 1968), passed after the appeal to the Western Court of Appeal was lodged but before the hearing, had under S.2 precluded judicial review of certain matters, one of which was the abatement of the appeal filed by the appellants in the Western State Court of Appeal. That Decree had also affirmed the validity of the Order made against the appellants.

5. The Order impounded their property until the Military Governor of the Western State should otherwise direct.

In the Supreme Court the appellants sought to impugn the exclusionary provision in Decree No. 45 on the ground that it infringed the judicial power, in addition to their objection that the Order of the Tribunal of Inquiry violated their right to property under S. 31 of the Republican Federal Constitution of 1963.

Now, whether or not there was a judicial power to infringe and whether or not the 1963 Federal Constitution could nullify an Order affirmed by a Decree, depended on the status of the Federal Military Government.

The Court was of opinion that to determine the status of the Federal Military Government it "must of necessity examine the events in the country as from January 1966 and how the Federal Military Government came into being."⁶

The Court synopsised the submission of counsel for the respondent in the following words:⁷

In his argument before us, the learned Attorney-General for the Western State, on behalf of the respondents, said what took place in January 1966 was revolution and the Federal Military Government is a revolutionary Government which seized power on the 15th January, 1966. It accordingly has an unfettered right from the start to rule by force and by means of decrees and therefore nothing in the Republican Constitution of 1963 can be implied into the new mode of

6. Supreme Court, p. 16. (Unless otherwise indicated the pages in the footnotes refer to those in the judgment of the Supreme Court in the Lakanmi decision.)

7. P.16.

ruling the country: that section 3(1) of Decree No. 1 of 1966 gave the Federal Military Government unlimited power of legislation on any subject either by Decree or by part of the Constitution which has not been abrogated; that the doctrine of necessity which was propounded by counsel for defence, and about which we will say more later, does not apply. Further, that section 6 of Decree No. 1 of 1966⁸ must be construed literally and should not be construed to doubt the validity of a decree as this Court has interpreted an Edict in the case of Adamolekun v. The Council of the University of Ibadan, S.C. 378/1966 decided on 7th August, 1967; and that that interpretation can only be limited to an Edict. In short, the submission is that there is nothing in the Constitution which can make a decree void. He further submitted that once a document purporting to be a decree is signed by the Head of the Federal Military Government, it cannot be challenged and no court has any jurisdiction to adjudicate on its validity. The order of 31st August, 1967 by the Chairman of the Assets Tribunal, he submitted, was validly made since Decree No. 45 of 1968 made on the 28th August 1968 has validated everything done under it.

The Court next turned to the submission of counsel for the appellants and synopsised it thus:⁹

Chief Williams, learned counsel for the appellants, submitted that the Federal Military Government is not a revolutionary Government but a constitutional interim government, which came into being by the wishes of the representatives of the people, and whose object is to uphold the Constitution, excepting so far as it had to derogate from it under the doctrine of necessity whereby it was granted power. That thus the Federal Military Government assumes the continued existence of the Constitution and in its Decree No. 1 of 1966 impliedly provided for a separation of powers between the legislature, the executive and the judiciary as did the Constitution of Nigeria; that this must be perpetuated unless necessity otherwise arose

8. S.6 reads: "No question as to the validity of this or any other Decree or of any Edict shall be entertained by any court of law in Nigeria.

9. p. 17.

compelling it under section 3 of Decree No. 1 of 1966 to make laws by Decree 'for the peace, order and good government of Nigeria on any matter whatsoever.' This power, it was submitted, must not be read as an unfettered power to legislate to amend the Constitution save in so far as properly justified by the doctrine of necessity.

In regard to section 6 of Decree No. 1 of 1966 and the Adamolekun case (supra), Chief Williams submitted that section 6 of Decree No. 1 has to be read down as this court put it in Adamolekun's case to only not being able to challenge the legislative authority of a decree; that is, not to challenge the right of the Federal Military Government to make a law by way of a decree signed by the Head of the Federal Military Government as provided by section 4 and 5 of Decree No. 1 of 1966. Further, that a decree prevails over the Constitution only to the extent that the decree, if otherwise properly made, could amend the constitution. Finally, that the order Exhibit 'B' made on 31st August, 1967 by the Chairman of the Assets Tribunal was not validly made, since Decree No. 45 of 1968 which sought to validate it (and thus implied that it was otherwise invalid) was a legislative act which impinged upon the sphere of the judiciary and to that extent invalid as an executive interference into the sphere of the judiciary.

The Court, speaking through Ademola C.J.N., said that to facilitate comprehension of the doctrine of necessity it was essential to step into history. It pointed out that the Republican Constitution of 1963 had made provision for a President of the Republic (S.34); a bi-cameral legislature (S.41), an executive, known as the Council of Ministers (SS. 84, 87, etc.,) and a Judiciary "vested with full judicial powers" (Chapter 3). It said that all these provisions were in operation until 15th January, 1966, "when

a section of the army rebelled in different parts of the country".¹⁰ The evidence was that two regional premiers had been killed and that the Prime Minister of the Federation and one of his Ministers had been abducted to an unknown destination; some senior members of the army had died by assassination. Their lordships considered such occurrences as "unprecedented", the upshot of which was "serious constitutional upheaval".¹¹ The events which succeeded the initial military maelstrom were treated by the court as the successful effort of the head of the army to suppress the rebellion or quell the insurgency. This, with respect, is not the only interpretation of which the confused concatenation of circumstances is susceptible; the action of General Ironsi could be interpreted as a move the nature of which somewhat qualifies the constitutional rectitude with which the Supreme Court had endowed it, because the General's manoeuvre could have been merely a successful attempt to take over the rebellion initiated by his subordinates, even if the initial onset had not been instigated by him. Also, far from arresting the rebels, his moves might have resulted in the overthrow of an incipient rebel regime only to replace the latter by a rebellious regime of his own. The constitutional chiaroscuro is indistinct because the actual intention of General Ironsi is yet, and is likely to remain, unknown. The facts do not speak for themselves. The Court then

10. p. 18.

11. p. 18.

proceeded to emphasise the constitutional chaos by noting that the Minister who had previously acted for the Prime Minister and "who was apparently next to him"¹² was not in the country. The President of the Republic was also absent from Nigeria, although his absence was not, legally, a source of confusion because there was an Acting President. The Court then went on:

It appeared however that the Council of Ministers met without the Prime Minister and decided to hand over the Administration of the country to the Armed Forces before the situation got worsened.

The crucial passage above will be discussed later.

The text of the Acting President's speech then appeared in the judgment:¹³

Full Text of His Excellency The Acting President's Speech.

I have tonight been advised by the Council of Ministers that they had come to the unanimous decision voluntarily to hand over the administration of the country to the Armed Forces of the Republic with immediate effect. All Ministers are assured of their personal safety by the New Administration. I will now call upon the General Officer Commanding, Major-General Aguiyi-Ironsi, to make a statement to the nation on the policy of the New Administration. It is my fervent hope that the New Administration will ensure the peace and stability of the Federal Republic of Nigeria and that all citizens will give them their full co-operation.

12. p. 18.

13. p. 18.

The speech of General Ironsi, reproduced here just as it was partly recited by the court, was similarly broadcast on the same day:¹⁴

The Government of the Federation of Nigeria having ceased to function, The Nigerian Armed Forces have been invited to form an interim Military Government for the purposes of maintaining law and order and of maintaining essential services.

2. This invitation has been accepted and I, General J.T.U. Aguiyi-Ironsi, the General Officer Commanding the Nigerian Army, have been formally invested with authority as Head of the Federation Military Government, and Supreme Commander of the Nigerian Armed Forces.

Suspension of certain parts of the Constitution.
The Federation Military Government hereby decrees.

(a) The suspension of the provisions of the Constitution of the Federation relating to the office of President, the establishment of Parliament, and of the office of Prime Minister:

(b) The suspension of the provisions of the constitutions of the Regions relating to the establishment of the offices of Regional Governors, Regional Premiers and Executive Councils, and Regional Legislatures.

.....

The court, immediately after the quotation above, said:¹⁵

It is to be noted from the Government Notice (No. 148) set out above that the invitation to the Armed Forces, which was duly accepted, was to form an interim Military Government, and it was made clear that only certain sections of the Constitution would be suspended. It was evident that the Government thus formed is an interim government which would uphold the Constitution of Nigeria and would only suspend certain sections as the necessity arises.

14. p. 19.

15. p. 20.

Though fuller comment is to come later, it is proposed to make a few immediate remarks on the passage just quoted. It is true that Government Notice No. 148, 1966 (General Ironsi's Speech), referred to the invitation of the civil administration as one to form a Military Government that was to be only interim in nature. But the actual invitation itself, embodied in the statement of the Acting President (Government Notice No. 147, 1966), spoke of the Military Government as the New Administration and avoided all mention of the word interim. It is submitted that where the language of the invitation is free of a restriction which a mere reference to the said invitation contains, the invitation does not only by that circumstance suffer from the circumscription contained in that reference to it.

The court also thought it pertinent to recall that the Military Government had indicated that only certain provisions of the Constitution would be suspended. It is suggested that what is crucial to the status of the Military Government is not what parts of the Constitution "would be" suspended, but what parts of it "could be" suspended. The Court apparently failed to distinguish between the power exercised and the power exercisable. It was precipitate of it to regard the former as definitively circumscriptive of the latter.

The Court also emphasised that the Military Government "would only" suspend certain sections "as the necessity

arises". The language of their Lordships appears to suggest that it was the prerogative of the new regime to decide when it was necessary, and what sections of the Constitution it was necessary to suspend. Had the phrase been "could only" instead of "would only" the former might be construed as representing the court's view that circumstances of necessity alone could empower the regime to suspend the Constitution. In preferring the phrase "would only" the court was inconsistent with its attitude that the Military Government was not paramount. That phrase appeared to recognise an absolute discretion in the Military Government to decide what measures were necessary.

The Court continued:¹⁶

At this stage it is incumbent on us to clear one point. It must be accepted that the Council of Ministers validly met at the time. The Acting President accepted that they met and they gave him an assessment of the situation. In our view, the Council of Ministers could validly meet in the absence of the Prime Minister, since the evidence available at the time was that the Prime Minister was alive but circumstances made it impossible for him to be present. If he had been killed or he was dead at the time, the situation might have been different.

Exception is not taken to the Court's view that the Council of Ministers could validly meet in the absence of the Prime Minister. The point at issue, however, is whether the Council could have been convened by someone who had not been appointed Acting Prime Minister by the

16. p. 20.

Acting President, barring the possibility of a retroactive and/or implicit appointment. The Court is surely right in maintaining that the Prime Minister was in law only absent because then as now there is no evidence to support the fact that he was dead at the time the Council was purportedly convened. If at the time the Acting President had exercised the President's power to appoint an Acting Prime Minister, no doubt could have been raised as to the validity of the meeting of the Council.¹⁷ Doubts have arisen, however, because it is not evident whether or not the Acting President had made such an appointment. There was certainly no express appointment. Could there have been an implied appointment at the time of the Council's meeting in that the meeting had a Chairman (a senior Federal Minister) whose position was acquiesced in by the Acting President who was himself present, although, apparently not wishing to exceed his constitutional authority, he did not preside? Could it not have been the case that, there being no provision in the 1963 Constitution positing otherwise, the appointment of an Acting

17. S. 39 of the 1963 Constitution invests the President's powers in an Acting President in the absence or incapacity or the vacancy of the office of the former.

S. 92 empowers the President to appoint an Acting Prime Minister where the Prime Minister is absent or incapacitated. Such appointment is to be on the advice of the Prime Minister. But the proviso to the latter requirement (S. 92(2)) prescribes:

"Provided that if the President considers that it is impracticable to obtain the advice of the Prime Minister owing to his absence or illness he may exercise those powers without that advice".

The underlining is mine.

Prime Minister in an unprecedented situation could have been, and was, effected by the mere acquiescence of the person qualified to make the appointment? Even supposing the Acting President had not made an appointment by acquiescence at the time of the meeting, could he not have made the appointment retroactively and by unavoidable implication when in his broadcast to the nation he spoke of his having been advised by the Council of Ministers? This surely presupposes that there was such a Council to advise him at the time. Can his statement then be inferential of his there and then having impliedly and retroactively authorised, to the time of the meeting, the Chairman of that meeting to be Acting Prime Minister? No other interpretation of his conduct is consistent with his having spoken of the Council having convened. S. 92 is silent as to whether the authorisation it permits has to be either express or prospective. It is submitted that in the absence of an express restriction to that effect and of circumstances which could be construed to create such a limitation, S. 92 should not be treated as only permissive of its operating prospectively after express authorisation. Whether, however, the validity of the Council's session has any bearing on the constitutionality of the surrender of civilian power to the military power, is another matter which will be examined later.

The Court then proceeded, after its aside, with the theme of the dispute, i.e. the existence or non-existence of such a concept in legal theory as a doctrine of necessity,

and its applicability to Nigeria:¹⁸

It is apt to point out, however, that the learned Attorney-General does not accept the doctrine of necessity, nor does he seek to argue whether or not necessity has been shown in this case. He bases his case on the fact that necessity, or rather the doctrine of necessity, does not arise for our consideration. We understand him to say that questions of necessity only arise with Colonial Governments. Indeed, as we stated earlier, what happened in Nigeria in January 1966, in the submission of the learned Attorney-General, was a revolution.

It should be noted that the passage quoted suggests that both the Court and the Attorney-General assumed that there is only one species of revolution in law. It will be argued later that there may be a distinction between a revolution that does not call in aid the doctrine of state necessity, assuming there is such a doctrine; and a revolution that does. The usefulness of recognising such a doctrine will also later be canvassed.

The Court went on:¹⁹

It is no gainsay that what happened in Nigeria in January 1966 is unprecedented in history. Never before, as far as we are aware, has a civilian government invited an army take-over or the armed forces to form an interim Government. We disagree with the learned Attorney-General that these events in January 1966 are tantamount to a revolution. As Chief Williams for the appellant puts it, quoting from the Shorter Oxford Dictionary, a revolution occurs when there is an overthrow of an established government by those who were previously subject to it or 'where there is a possible substitution of a new ruler or form of government'. These from the facts, did not take place in Nigeria in 1966, as the situation to which we have previously referred - a rebellion by some

18. p. 20.

19. p. 20.

members of the Armed Forces - caused the Acting President, with the advice of the Council of Ministers in the absence of the Prime Minister, to hand over power to the Armed Forces. We venture to put the attitude of the Acting President and the Council of Ministers to the head of the Army thus - your men have started a rebellion, which we fear may spread; you have the means to deal with them. We leave it to you to deal with them and after this, return the administrative power of the Government to us.

The last two sentences quoted have been described by a learned commentator as "A most graphic and near-ludicrous illustration".²⁰ Ojo proceeds thus:

Surely, the normal and logical inference from the above statements [i.e., the two sentences mentioned] is that although the Federal Government ceased to function at the time and it had therefore found it necessary to call for a provisional interim military government, yet, when it thinks it can function again it will then relieve the provisional interim government of its offices and take over the realm of government. Aside from the fiction of power transfer, is it realistic to talk of 'returning the administrative power of the Government to "us"?' Who are these 'us'? Assuming that the Military Government comes to an end, can the old Ministers and other functionaries gather together again and claim as of right to return to power, without more? Although the use of the word 'us' by the Supreme Court will suggest this, yet one can say, without any fear of contradiction, that, unless words have lost their meanings, the Supreme Court will not be prepared to press this to its logical conclusion. 'Government in exile' may be a familiar concept but the theory of a 'Government in abeyance' is new learning, particularly when the 'Government' which purported to hand over power had 'ceased' to function.

20. Abiola Ojo, 1971, I.C.L.Q., p. 117, at p. 128.

The scorn that cascades from Ojo's strictures is not wholly deserved. Ojo objects to the view that the Military Administration was interim, yet in his speech of accession to power General Ironsi used that very word to qualify the nature of his government. Ojo uses the phrase "provisional interim" in representing the Court's view of the Military Government. That phrase was never used by the Court, and indeed it is not immediately obvious how, in this context, the word "provisional" could add to "interim". Mr. Ojo castigates the ambiguity introduced by the Court's use of the word "us". It is by no means absurd to treat that word as referring to whoever at a particular time should be found to be representing the civilian power. At the time of the ceremony of transfer, the "us" should refer to the soi-disant Council of Ministers who were the most plausible representatives of the civilian power. But it may be asked who is to represent the civilian power if the military ever relinquishes its possession of power. Representatives of the civilian power can always be ascertained by the holding of a referendum in which the people are asked to choose one of several proposed constitutions, following which the system of selection enjoined by the chosen constitution will be implemented. The language of the Supreme Court does not lead inexorably to its belief in the feasibility of a "Government in abeyance", despite Ojo's statement that it does.

The difficulty in the statement of the Court lampooned by Mr. Ojo concerns rather the issue of who is to decide the moment when the military régime has completed its task and ought to return its power to the civilians. The logic of law and the reality of power are very likely to point in different directions. The law may suggest that the courts, vested as they are with the ultimate power to decide questions of law, should be entrusted with deciding when the operation of the doctrine of necessity expires. The military government might say that because they would be more conversant with the facts, they, and not the judges, would be more qualified to decide. In the end the power of the Military is difficult to resist.

After thus insisting that what took place in Nigeria in January, 1966, was not a revolution the Court ventured to cite a few examples of revolutionary governments, with a view to distinguishing them from the case in hand. The Court dealt with the overthrow of the 1962 Constitution of Uganda in these words:²¹

.... we would like to refer to the case of Uganda v. Commissioner of Prisons (1966) E.A.L.R. 514, where there were no pretensions on the part of the Prime Minister who abolished the Constitution of the country in the National Assembly and substituted a new one, which installed him as Executive President with power to appoint a Vice-President contrary to the Constitution of the country - actions which could only appropriately be described in law as a revolution.

21. p. 27.

Read sceptically, this passage could be regarded as an encouragement to covert revolutionaries in that it appears to put a premium on pretensions. The position would have been indistinguishable from that of Nigeria had Dr. Obote, in his capacity of Prime Minister, handed over power to himself, in his new capacity of President of the Republic of Uganda. The crucial point to note is that both procedures would have been contrary to their respective constitutions. The fact that one was more overtly so is surely not material.

The Court also quoted, from the judgment of the Ugandan Supreme Court, a description by the latter of the revolutionary situation in Pakistan in 1958:²²

.....that the President's proclamation of October 7th, 1958, by which the Constitution of 1956 was annulled and martial law was proclaimed constituted an 'abrupt political change' not within the contemplation of the said Constitution, i.e. a revolution. A victorious revolution is an internationally recognised legal method of changing a constitution. Such a revolution constitutes a new law creating fact. Laws which derive from the 'old order' may remain valid under the 'new order' 'only because validity has expressly or tacitly been vested in the same, not the reason of validity'. Further no jurist would maintain that even after a successful revolution, the old constitution and the law based thereupon remain in force, on the ground that they have not been multi-fied by the old order itself.

The Nigerian Supreme Court thus treated the Pakistani case in 1958 (State v. Dosso) and the Ugandan decision in 1966, as identical in legal doctrine, the Court in Uganda having

22. p. 21.

cited the decision in Pakistan as an authority, and the Nigerian Supreme Court having concurred in both of them.

The learned Attorney-General of Western Nigeria had sought to assimilate the position in Nigeria to those in Pakistan and Uganda.²³ He drew attention to the fact that both the legislative and executive in Nigeria had been abrogated by the Military Government, and the judiciary was not left untouched in that a new code for the appointment of judges had been introduced. To the assertion that many of the provisions of the 1963 Constitution were still in operation, learned counsel riposted that such provisions as had not suffered supersession remained only because the military government did not decree their abrogation: the point was that the 1963 Constitution had survived only by the grace of the Military Government. The Court continued its summary of the Attorney-General's submission thus:

The learned Attorney-General argues further that there is no provision in the 1963 Constitution enabling the Acting President, in the absence of the Prime Minister, even with the advice of other Ministers, of the Council of Ministers, to hand over the administration of the country to the Armed Forces of the Republic. What happened, he said, was that the Government 'having ceased to function' agreed to abdicate its powers and that therefore there was a revolution.

The Supreme Court attempted to reply with its version of the doctrine of necessity:²⁴

23. p. 21.

24. p. 22.

We think it is wrong to expect that constitutions must make provisions for all emergencies. No constitution can anticipate all the different forms of phenomena which may beset a nation. Further, the executive authority of the Federation is vested in the President by section 84 of the Constitution and we think in a case of emergency he has power to exercise it in the best interest [subjectively to be ascertained by him?] of the country, acting under the doctrine of necessity. Moreover, it must be remembered that it is not a case of seizing of power by the section of the Armed Forces which started a rebellion. The rebellion has been quelled, the insurgents did not seize power nor was it handed over to them. But the state of affairs in Pakistan to which The State v. Dosso (supra) refers is different. In Pakistan the President had issued a proclamation annulling the existing Constitution. There was a disruption of the Constitution and the national legal order by an abrupt political change not contemplated by the Constitution. Such a change is a revolution.

It is not difficult to adopt the court's own language to the Nigerian position in January, 1966. The words "an abrupt political change not contemplated by the Constitution" used by the court in relation to the position in Pakistan were equally apposite to that in Nigeria. Again, the court itself had been constrained to concede earlier that "it is wrong to expect that constitutions must make provisions for all emergencies. No constitution can anticipate all the different forms of phenomena which may beset a nation".²⁵ Thus the Nigerian Supreme Court betrays its bewilderment by simultaneously asserting that a political change not contemplated by a pre-existing constitution is a revolution when it happens in Pakistan but that such a change is not a revolution when it happens in Nigeria!

25. p.22.

It will be recalled that the Court said that the executive authority of the Federation was vested in the President who in an emergency had power to exercise it in the best interest of the country, acting under the doctrine of necessity. It is astonishing for the Court to regard the purported transfer of the totality of the Federation's powers to the Military Government as an executive act: if such an act could be classified at all it would surely have been described as legislative. Again, why did the Court have to rely on S.84 (the section which vests the formal executive authority in the President) if it was of opinion that the President had acted under the doctrine of necessity? The only relevance of S.84 would have been to indicate that because the President wielded executive authority he was the person most appropriate as the organ for the exercise of exceptional power under the doctrine of necessity. It is disingenuous of the Court to suggest that the doctrine only extended the scope of S.84, as distinct from having totally superseded it. Assuming the transfer to have been valid, S.84 guided, but it did not govern, the doctrine of necessity.

The Court concluded its summary of the Attorney-General's submission on the basis of power of the military government thus:²⁶

The submissions by the learned Attorney-General leave no room for the doctrine of necessity. He argued that as there was a revolution in the country in 1966, it is not permissible to read into the actions of the Federal Military Government

any fetter arising out of the Republican Constitution of 1963 and the Government could legislate as it thought fit and could superseded and modify portions of that Constitution as it thought fit; that section 3(1) of Decree No. 1 of 1966 should be given its plain meaning and nothing should be read into it; that also the proviso to section 1 of the Constitution should be given its literal meaning and that it puts no limitation on the power of a decree and in effect a decree automatically prevails over the Constitution whether or not it is specifically or impliedly inconsistent with it.

Before we enter into the compact but intricate submission of the Attorney-General, it behoves us to ask ourselves what a decree is? Is it a law or enactment made by the military government, or is it simply an instrument made by the military government and only expressed to be a decree? If it be the former then the courts could examine a decree in the sense that they would be entitled to verify that it is a law or enactment made by the Military Government, that it is formally as well as substantively a decree.

If a decree be the latter (i.e. if it be merely as it is defined in S. 16 of Decree No. 1) then once the courts find that an instrument has been (1) made by the Military Government and (2) merely expressed to be a decree, they must pronounce it to be ^a valid decree. What S. 16 declares is that a decree is nothing more than an instrument which proclaims itself to be a decree, which instrument has been signed by the Head of the Federal Military Government. They cannot inquire into how it was made, notwithstanding the presence of fraud or duress, or whether it stood on a proper foundation of power, i.e.

whether it was made within a proper ambit of power. Thus, a decree as defined in S. 16 has only to be formally valid: substantive validity would indeed not be a constituent of its nature. Such must be the outcome if S. 16, and thus Decree No. 1 itself, is treated as valid.

The Supreme Court did not advert to S. 16 of Decree No. 1 when claiming the right to question the substantive content of a decree. Does this inadvertence render the judgment per incuriam? It cannot be that the Court treated the whole of Decree No. 1 as void; it took great care merely to limit the ambit of S. 3(1) thereof. It thus only restricted the area of substantive power of the Military Government. Had it also wished to limit the formal or procedural power of the Military Government it could have impugned S. 16 of the same decree. Now, if one combines the unquestioned S. 16²⁷ with the equally unquestioned proviso²⁸ to S. 1 of the 1963 Constitution, which proviso was inserted by S. 1(2), Decree No. 1, 1966 one gets to a position wherein if something called a decree, which under S. 16 is all that a decree is, is inconsistent with the Constitution, the Constitution's own proviso would operate to abrogate such provisions as contained in the Constitution, save the proviso itself, as are inconsistent with the decree aforesaid. In fine, this

27. Part of S. 16, Decree No. 1, 1966, reads:

"In this Decree, and in any other law 'Decree' means an instrument made by the Federal Military Government and expressed to be, or to be made as, a decree".
(The underlining is mine.)

28. "Provided that this constitution shall not prevail over a decree, and nothing in this constitution shall render any provision of a decree void to any extent whatsoever".
(the underlining is mine.)

combination, insofar as it relates to the efficacy of decrees to override provisions in the Constitution, renders S. 3(1) partially otiose. This means that even if S. 3(1) had not conferred on the Federal Military Government Supreme Substantive legislative authority, the 1963 constitution could still have been overridden by that constitution's own subservient proviso which stipulated that its contents were not to prevail over a decree, which in terms of S. 16 of Decree No. 1, 1966, is simply an instrument satisfying certain formalities. Also, by a combination of S. 16 and S. 6(2), no decree can be questioned for lack of area of power. This renders S. 3(1) completely otiose. The area of power is not relevant because a decree is simply an instrument made by the Military Government and which has to be merely expressed as a decree. This view obtains even granting the judiciary the power to examine an instrument to ascertain whether or not it constitutes a decree: this is due to the narrowness with which S. 16 defines a decree. The courts are incompetent to question a decree in relation to a basis of power not because they lack the power to review this relationship but because a basis of power is not an integral part of a decree. It is submitted that the definition of a decree contained in S. 16 of decree No. 1 (1966) is defective in that only its identification and not its legal nature is expressed. It is suggested that a decree should be defined thus:

A decree is a law made under the legislative authority of the Federal Military Government, which authority shall be expressed through an instrument declaring itself a decree, which instrument shall require for its validity the signature of the Head of the Federal Military Government.

The suggested definition, unlike that in S. 16 of Decree No. 1 (1966), embodies both the substantive and formal aspects of a decree. A decree as defined by S. 16 does not require a source of authority, or, at least appears not to have such a requirement.

A difficulty encountered is Decree No. 1 itself, which purports to define its own essence as restrictively as it has defined that of subsequent decrees. In ascertaining the scope and meaning of the latter one can always turn to the former, but to ascertain the efficacy of Decree No. 1's definition of itself one is unable to resort to a prior enactment from which the decree derives its authority. One therefore cannot without more accept Decree No. 1's definition of itself as conclusive. In order for that Decree to be efficacious one must discover its source of authority. At present we are not so much concerned with the identity of the source itself as with the necessity for that decree to have such a source. This necessity decisively distinguishes Decree No. 1 from subsequent decrees because the latter are constitutively more restricted since their essence as defined in S. 16 is identified with a formal act that does not reveal its source of authority. But S. 16's definition of Decree No.1

itself cannot logically be acceded to, because it is circuitous of Decree No. 1 to define its own essence.

The Attorney-General's submission, summarised earlier, will be discussed after the content of the judgment has been presented. Since we are at this juncture primarily concerned with what was said, rather than the correctness of what was said, by the parties and court, we will now quote the court's reply to the Attorney-General's submission:²⁹

As we stated earlier in this judgment, the learned Attorney-General does not accept the presumption of necessity. We have earlier on pointed out that in our view the Federal Military Government is not a revolutionary Government. It made it clear before assuming power that the Constitution of the country still remains in force, except in certain sections which are suspended. We have tried to show that the country is governed by the Constitution and Decrees which, from time to time, are enacted when the necessity arises and are then supreme when they are in conflict with the Constitution. It is clear that the Federal Military Government decided to govern the country by means of the Constitution and Decrees. The necessity must arise before a decree is passed ousting any portion of the Constitution. In effect, the Constitution still remains the law of the country and all laws are subject to the Constitution excepting so far as by necessity the Constitution is amended by a Decree. This does not mean that the Constitution of the country ceases to have effect as a superior norm.

(By thus speaking of the Constitution only as a superior, and not as a supreme, norm does the court imply that ^{the} Nigerian body politic acknowledges an authority transcendent of the Constitution? If so, what is the identity of this constitutional entity?)

From the facts of the taking over, as we have pointed out, the Federal Military Government is an interim Government of necessity concerned in the political cauldron of its inception as a means of dealing effectively with the situation which has arisen, and its main object is to protect lives and property and maintain law and order.

To sustain its thesis the Court quotes from passages in two judgments before, as the pillar of its authority, discussing the case in Cyprus, Attorney-General for the Republic v. Mustapha Ibrahim of Kyrenia (1964) 3 Supreme Court of Cyprus 1. Their lordships of the Nigerian Supreme Court introduced their confidence in a doctrine of necessity by turning to a paragraph by Willes J. in Phillips v. Eyre (1871) 6 L.R. Q.B. 1, at p. 16, which reads:³⁰

This perilous duty, shared by the Governor with all the Queen's subjects, whether civil or military, is in an especial degree incumbent upon him as being entrusted with the powers of government for preserving the lives and property of the people and the authority of the Crown; and if such duty exist as to tumultuous assemblies of a dangerous character, the duty and responsibility in case of open rebellion are heightened by force of arms and a state of war against the Crown established for time. To act under such circumstances within the precise limits of the law of ordinary peace is a difficult and may be an impossible task, and to hesitate or temporize may entail disastrous consequences.

The Court then had recourse to a dictum from the dissenting opinion of Lord Pearce in Madzimbhanuto v.

Lardner-Burke [1969] (1)A.C. 645 at p. 740:

The principle of necessity or implied mandate is for the preservation of the citizen, for keeping law and order, rebus sic stantibus, regardless of whose fault it is that the crisis has been created or persists.

The Court described the case of Mustapha Ibrahim thus:³¹

In that case, owing to the immutable nature of the constitution of Cyprus and the political secession of the Turkish members of the judiciary and of the legislature, the courts and the parliament were unable to function. The Greek members of Parliament took upon themselves to pass a 'law' providing for a new Supreme Court with no racial quorum, such as had been provided by the Constitution. The new Court, staffed by Greek judges only, was set in motion and started to function. It was contended that the 'law', being unconstitutional, was a nullity; but all the three judges held that the 'law' should be read into the Constitution, by applying the doctrine of necessity, and that the new Court was duly constituted. We quote a portion of the judgment of Josephides, J. where he said as follows:-

'Faced with the non-functioning of the two superior courts of the land, and the partial breakdown of the District Courts, the Government had to choose between two alternative, viz. either to comply with the strict letter of the constitution (the relevant articles being unalterable under any condition), that is, cross its arms and do nothing but witness the complete paralysis of the judicial power, which is one of the three pillars of the State (vide Prof. Alessi, ubi supra, at pages 218-9); or to deviate from the letter of the constitution, which had been rendered inoperative, by the force of events (which situation could not be foreseen by the framers of the constitution), in order to do what was imperatively and inevitably necessary to save the judicial power temporarily until return to normal conditions so that the whole State structure may not crumble down. I have no hesitation in arriving at the conclusion that in these exceptional circumstances it was the duty of the Government through its legislative organ, to take all measures which were absolutely necessary and indispensable for the normal and unobstructed administration of justice. I agree with the submission of respondent's counsel that the measures taken should be for the duration of the necessity and no more. This is also conceded by the learned Attorney-General of the Republic.

The question now arises: Did the legislature do what was absolutely necessary in the circumstances or did it exceed it?'

By recognising the fact that there is a doctrine of necessity we do not alter the law, but apply it to facts as they do exist. We are unable to find that the facts of cases cited to us by the learned Attorney-General do fit in with the events which took place in this country in January 1966; but they are basically cases of revolution.

As yet, it is not proposed to comment on the elaborate arguments made by the Court and both counsel on the status of the Military Government. Such comment will follow only after the presentation of the court's and counsel's views on the judicial power in Nigeria at the time of the judgment.

Adverting to Decree No. 45, 1968, the Court said:³²

The questions we ask ourselves are, was the passing of this decree a performance of legislative function as envisaged by section 3(1) of Decree No. 1 of 1966? and does it go beyond the requirements or demands of the necessity of the case?

The juxtaposition of the two questions appears to suggest that the second question need only be answered if the answer to the first is in the Affirmative. This is questionable. Is the court saying that even if Decree No. 45 had been passed in response to, and only to the extent of, the demands of the necessity of the situation, it could still have been avoided merely because S. 3(1) of Decree No. 1 did not have it within its contemplation? The remarkable conclusion would then be forced of the court

32. p. 27.

maintaining that S. 3(1) of Decree No. 1 was paramount over the dictates of the doctrine of necessity. It is suggested, however, that in placing the questions in the order that it did, the court was only committing an inadvertent volte-face. The only question which the court could ask without seeming to undermine its own thesis was whether the Decree embodied provisions which exceeded the requirements demanded by the circumstances of necessity.

It may be argued that the juxtaposition of the two questions by the court is not illogical, on the basis that the court having declared that the Military Government on the date of its accession had not been vested with the judicial power because that Government had only claimed legislative supremacy as defined in S. 3(1) of Decree No. 1, 1966, it was only logical that the court should have vitiated as ultra vires any purported extension of the Federal Military Government's authority. The court's attitude is valid only on the assumption that the dictates of the doctrine of necessity were distilled and *codified* in Decree No. 1: an assumption which would serve to preclude the Military Government from laying claim to that species of authority (the judicial power) which it had neglected to claim for itself when it acquired the legislative and the executive authority in the country. This assumption, if it is not rejected, would deprive the doctrine of necessity of its essence, which is, or should logically be, the uncontrolled, indeed uncontrollable,

responsiveness to the imperatives of circumstances, namely, that that which conduces to or preserves the welfare of the state not only can, but also must, be done. Since the doctrine of necessity is activated solely to secure the salvation of the state, it is illogical to restrict it in any form or manner because this would mean that the rules of restriction transcend the imperative of national salvation. It is suggested that the court, having pronounced that Decree No. 1, 1966, was valid only because the doctrine of necessity so required, could not, without the risk of inconsistency, seek to restrict the doctrine of necessity with a law created by, and hence subject to alteration by, the doctrine of necessity itself. There is nothing in that doctrine capable of suggesting that a legislative instrument, if found to be necessary by whatever is the adjudicating body, is debarred from operating in an area of law which in normal conditions would be a matter for the judiciary. It is therefore incorrect of the court to insist that a decree is to be ^{de} ~~deser~~ validity unless, in addition to its being necessary in the circumstances, it is also within S. 3(1) of Decree No. 1, 1966. It may be objected in the court's favour that what is not within S. 3(1) is not a decree and therefore cannot be enforced. There are two answers to this defence of the court's position. First, a decree, as we have found occasion to notice, is not an instrument either defined by, or required to comply with, S. 3(1). A decree is defined in S. 16 (which does not contain any reference to S. 3(1))

and is removed from challenge to its authority from the courts by S. 6. The court is *estopped* from questioning the prohibition expressed in S. 6 because it appears in the same decree as S. 3(1) the validity of which the court necessarily accepted when it required decrees to comply with it. If the court thus submitted to S. 3(1), surely it also could not impugn S. 6 because the two sections are integral to Decree No. 1, 1966, and must therefore stand or fall together.

Second, even if subsequent decrees were required by Decree No. 1 to comply with S. 3(1) this fact would not prove fatal to such subsequent decrees which ignore this requirement, because Decree No. 1, being a creature of the doctrine of necessity, is itself subject to variation or even repeal by the latter. Therefore, if a measure of the Military Government is necessary in the sense that it satisfies the doctrine of necessity, it is not required, in addition to this, to comply also with S. 3(1), and the court's opinion that both requirements are necessary to the validity of a decree is, it is suggested, erroneous. It is true that the doctrine can strike down a purported legislative measure notwithstanding its compliance with S. 3(1) because the doctrine is superior to S. 3(1); but the converse does not hold. To content otherwise is to exalt creature above creator. S. 3(1) exists as a manifestation of the doctrine of necessity and cannot prevail against a subsequent manifestation of the latter if such subsequent manifestation should prove to be inconsistent with its terms.

It is perhaps appropriate to close this point with a repeated quotation of S. 3(1), which provides:

The Federal Military Government shall have power to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever.

There is no reason why the doctrine of necessity should not be competent to extend the above quotation to read:

The Federal Military Government shall have power to make laws (and shall also be invested with the judicial power of the state) for

There is also no reason why an alteration of S. 3(1) has to be express. A subsequent decree inconsistent with Decree No. 1, 1966, surely overrides the latter.

Chief Williams, counsel for the appellants, had argued that the effect of Decree No. 45 was usurpation of judicial power³³ as it purported to deprive the appellants of their properties by a legislative act which failed to make provision for compensation, thus contravening S. 31 of the Constitution which made the payment of compensation compulsory. It is true that S. 31(3)(b) had excepted from the right to compensation a forfeiture resulting from a breach of the law, but, submitted Chief Williams, that exception was expressed to apply only to a General law providing for such forfeiture, and did not cover a law of forfeiture made ad hominem. Implicit in his submission is the point that the circumstances of necessity not requiring the supersession of S. 31 of the 1963 Constitution,

that provision must apply to the case in hand to nullify the impugned decree.

The court thought that the best way to treat Chief Williams' argument was to point to an admission which the Attorney-General was supposed to have made that the separation of powers had survived the accession of the Military Government.³⁴ With the greatest respect, it must be doubted whether the learned Attorney-General did in fact make so broad a concession which would have destroyed his case. If there was still a separation of powers, as distinct from the very different concept of the courts being permitted by the Military Government to continue their functions, the Supreme Court could simply point to S. 31 of the 1963 Constitution and say that because Decree No. 45 did not conform to it and that since the decree was thus a usurpation of the judicial power, it was void as infringing the doctrine of the separation of powers as embodied in that Constitution. The Attorney-General could not, therefore, have made the drastic concession claimed by the court.

The court then went on to point out that the 1963 Constitution of Nigeria "clearly follows" the model of the American Constitution because in the distribution of powers the Nigerian courts "are vested with the exclusive right to determine justiciable controversies between citizens and between citizens and the State".

³⁴. p. 27.

The court then quoted from Black J. in Lovell v. United States (1946) 66 Supreme Court Reports 1073 at p. 1079, thus:³⁵

Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts.

The court followed this up by stressing that the purpose of a written Constitution was to define, so as to circumscribe, the powers of the legislature, leaving the remainder to the courts. One must presume that the executive has been omitted otherwise than advisedly.

Describing the series of decrees purporting to affect the case before the court, their Lordship observed:³⁶

These enactments are directed against certain named individuals with the aim of punishing them or depriving them of their properties. These individuals were not being dealt with as general members of the public for whom laws are passed generally.

The substance of the court's gravamen against the Military Government is therefore that the decrees in question were enacted ad hominem and that this was an intrusion on the judicial power in circumstances where the doctrine of necessity could not be invoked, such intrusion not having been found to be necessary for the peace, order and good government of Nigeria.

35. p. 28.

36. p. 29.

The court thought that as regards the facts before them the decision of Liyanage v. The Queen (1967) 1 A.C. 259 was a case in point. It therefore cited with approval an extract from the judgment of Lord Pearce, at p. 289:

In so far as any Act passed without recourse to section 29(4) of the Constitution purports to usurp or infringe the judicial power it is Ultra Vires It goes without saying that the legislature must legislate, for the generality of its subjects, by the creation of crimes and penalties or by enacting rules relating to evidence. But the Acts of 1962 had no such general intention. They were clearly aimed at particularly known individuals who had been named That the alterations in the law were not intended for the generality of the citizens or designed as any improvement of the General law is shown by the fact that the effect of these alterations was to be limited to the participants in the January coup and that, after these had been dealt with by the judges, the law should revert to its normal state.... The first Act was wholly bad in that it was a special direction to the Judiciary as to the trial of particular prisoners who were identifiable and charged with particular offences on a particular occasion..... As had been indicated already, legislation ad hominem which is thus directed to the course of particular proceedings may not always amount to an interference with the functions of the judiciary. But in the present case their Lordships have no doubt that there was such interference; that it was not only likely but the intended effect of the impugned enactment; and that is fatal to their validity.

The court continued its quotation from Lord Pearce by adverting to what his Lordship said at p. 291:

One might fairly apply to these Acts the words of Chase, J., in the Supreme Court of the United States in Calder v. Bull (1799) 3 Dallas 386:

'Blackstone in his Commentaries said -

'Therefore a particular Act of the legislature to confiscate the goods of Titius or to attain him of high treason, does not enter into the idea of a municipal law; for the operation of this act is spent on Titius only and has no relation to the community in general: it is rather a sentence than a law.'

If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges. It is appreciated that the legislature had no such general intention. It was beset by a grave situation and it took grave measure to deal with it, thinking, one must presume, that it had the power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringed the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution. In their Lordships' view the Acts were ultra vires and invalid.

The Nigeria Supreme Court, even after such an extensive quotation, was, however, prepared to concede:³⁷

We are not unmindful of the fact, that not all enactments of this nature are judicial legislation.....every case must depend upon the facts surrounding it.

Having thus found that the Military Government had encroached upon the judicial power the Court proceeded to ask whether such encroachment was made in circumstances sufficiently imperative to have it justified under the doctrine of necessity. Their Lordships thought not:³⁸

We must once again point out that those who took over the Government of this country in 1966 never for a moment intended to rule but by the Constitution. They did, in fact,

37. p. 31.

38. p. 32.

recognise the separation of powers and never intended an intrusion on the judiciary. Section 3(1) of the Decree No. 1, 1966 does not envisage performance of legislative functions as a weapon for exercise of judicial powers, nor was it intended that the Federal Military Government should, in its power to enact Decrees, exceed the requirements or demands of the necessity of the case. In the present case we are satisfied that Decree No. 45 did go beyond the necessity of the occasion.

Be it clearly noticed that their Lordships in that decisively important paragraph have refrained from, either inadvertently or advisedly, enlightening us as to how they came to be "satisfied" that the decree went beyond the demands of necessity. It is true that the Attorney-General had not been concerned to show that circumstances of necessity existed, for throughout the case he had consistently refused recognition to the doctrine, but in a decision so monumental in its impact, their Lordships could at least have adumbrated on the reason for their thinking that the decree was unnecessary to the peace, order and good government of Nigeria. When the Attorney-General cited³⁹ the amendment to S. 33(10) of the Western Nigerian Constitution ((Constitution of Western Nigeria (Amendment) Law 1963)) as an example of a retroactive validation which did not encroach on the judicial power despite the Regional Legislature's reversing a judicial decision (Adegbenro v. Akintola)⁴⁰, the court rightly

39. p. 33.

40. [1963] A.C. 614.

riposted that that enactment had never been tested before the courts: no doubt it was not clear whether the "Governor" who had assented to the amendment was in fact the lawful Governor; if not, then the amendment could not have been an amendment in terms of the Region's Constitution. It is interesting to speculate on whether in that case the doctrine of necessity could have been invoked to remedy the contemplated constitutional irregularity.

We shall now quote the concluding portion of their Lordships' decision:⁴¹

At the passing of Decree No. 37 of 1968, the present case was pending in the Western State Court of Appeal. Although the Decree repealed Edict No. 5 of 1967 and purported to withdraw the Constitutional rights to challenge by way of action and prerogative writs in any Court of law provided in Chapter III of the Constitution, dealing with Fundamental Human Rights, the Decree refrained from touching the order made against the appellant. It would appear that more thoughts were given to this enactment and Decree No. 43 of 1968 followed. But Decree No. 45 of 1968 is the pith and meat of the matter. It validated everything that was wrong or wrongly done, referred specifically to the names of the appellants in its schedule, without defining anew 'public officer'. Validated orders made against the 2nd appellant who according to section 13(1) of Decree No. 37 of 1968, could not by any stretch of imagination be considered a public officer. In an attempt to crown the efficacy of the Decree, it purported to abate all actions and appeals pending before any court. In short, it stops the pending appeal of the appellants in the Western State Court of Appeal. We have come to the conclusion that this Decree is nothing short of legislative judgment, an exercise of judicial power. It is in our view ultra vires and invalid.

We are in no doubt that the object of the Federal Military Government, when it engaged in this exercise, is to clean up a section of the society which had engaged itself in corrupt practices -

these vampires in the society whose occupation was to enrich themselves at the expense of the country. But if, in this pursuit, the Government, however well-meaning, fell into the error of passing legislation which specifically in effect, passed judgment and inflicted punishment or in other words eroded to (sic) the jurisdiction of the courts, in a manner that the dignity and freedom of the individual, once assured, are taken away, the courts must intervene. Every case, we reiterate, must be considered on its own facts and the materials placed before us in this matter lead to no other conclusion than that the provisions in the Decree No. 45 of 1968 are such as are not reasonably necessary to achieve the purpose which the Federal Military Government set out to fulfil.

Again, we are not told why the Decree was not necessary in the circumstances. Their Lordships continued:

This appeal will therefore be allowed and both Edict No. 5 of 1967 and the Decree No. 45 of 1968 are declared ultra vires; they are null and void.

Now, we recorded during argument before us, that counsel on either side, if this case were to be sent back to the Western State Court of Appeal to hear the arguments on the issue before the High Court, would have nothing more to add to their arguments and submissions before us. No useful purpose will be served therefore in sending the case back. We have already pointed out that we cannot support the judgment of the learned judge of the High Court and also that the preliminary objection to the jurisdiction of the Western State Court of Appeal was wrongly upheld.

It follows that the order dated 31st day of August, 1967 made by the Assets Tribunal and which was admitted in evidence as Exhibit 'B' in the certiorari proceedings must be quashed, and is hereby quashed.

Thus the Supreme Court, exerting all the majesty of the judicial power of review, pronounced the Federal Military Government to be subordinate in authority to the

1963 Constitution, except on matters where the doctrine of state necessity required that Constitution to be amended or suspended in certain of its sections.

Would the Military Government abide by this decision, which has so openly disputed the absolute supremacy which Decree No. 1, 1966, claims that Government possesses? Even if the judgment were not to be explicitly disavowed by the Military Government, has it been correctly decided? It is proposed to answer these questions in the next Chapter.

CHAPTER 4A CRITIQUE OF THE JUDICIAL RESPONSE

In the light of Lakanmi's case we will examine the status and nature of the Federal Military Government of Nigeria.

If what had occurred in January, 1966, was a revolution then the 1963 Constitution was overthrown, and such of its provisions as have been preserved are preserved only through their being accepted by, and their consequently deriving authority from, the new legal order. If the 1963 Constitution was destroyed there could not have been a Council of Ministers as known to that Constitution. So, there would have been no such Council even had the letter of the Constitution been observed in summoning the individuals who had formerly held federal Ministerial posts. The "Acting President" would not have been the Acting President and Major-General Ironsi would not have been the Major-General Ironsi of the Republican Government. The Acting President must and could only have been such under a new legal order and Ironsi could only have had his rank conferred (not retained for him) by a fresh legal order. All offices of Government were not continued but created by the new legal order. Because of the possibility of a revolution creating in law, by retaining in fact, some laws of the former legal order it

is difficult to concur in the view of a learned author:¹

In the view of the present writer, the crux of the case is whether or not the events which took place in Nigeria on January 15, 1966, could be said to be a revolution or a mere 'constitutional emergency.' In the former, all laws emanating from the Government would not be subject to judicial review because the old order under the 1963 Constitution would have yielded to the new legal order; if the latter, however, the provision of the old Constitution will apply and the Supreme Court would be able to consider the Constitutionality of any law made by the Federal Military Government.

Both alternatives so strictly defined, are wrong. If the new order in fact retains and in law creates the judiciary then the power of judicial review can be exercised notwithstanding the revolution. This assumes that the new order, though brought about by the Military, was one in which the Military acted as catalyst and then became a constituent of that order which its catalytic action had created.

But even if the old order remains in virtue of the doctrine of necessity it need not be that the judicial power is preserved because the doctrine of necessity may direct its abatement.

Now, was there a revolution in Nigeria? Kelsen, it will be recalled, speaks of the efficacy of the legal order as a whole. Did the abrogation of the federal and state executives and legislatures constitute the deprivation of such efficacy to the order established by the 1963 Constitution? It is submitted that it did. The 1963

1. Ojo, 1971 I.C.L.Q. 117, at 118.

Constitution was constituted of three organs: the legislature, the judiciary and the executive. Two of these were made moribund - the third by itself cannot sustain the efficacy of the order as a whole. Therefore, if Kelsen's theory of legal orders is accepted, the events of January, 1966, in Nigeria can be taken to have effected a revolution.

The conclusion reached in the preceding paragraph assumes that the Military Government did what it did on a basis exclusively constituted of force. If the basis upon which the Military Government rested its decisions was other than that of naked force or of the threat of such force, a different conclusion should not be ruled out. The crucial question now arises which power sanctioned the abrogation of the legislatures and executives. The Attorney-General of the Western State had maintained that these bodies had been superseded by the Military Government by virtue of its own power. The appellants sought to attribute this to the operation of the doctrine of necessity. First, let us consider the argument of the Attorney-General. It will be recalled that General Ironsi spoke of the Nigerian Armed Forces having been "invited" to assume power. This is not revolutionary language. Read in conjunction with the Acting President's speech the invitation alluded to by the General must refer to the invitation of the Federal Cabinet, assuming the parties were right in that at that time there was still such an entity. Also the General

spoke of an interim government. He also specified that it was "for the purposes of maintaining law and order and of maintaining essential services". The language just quoted is connotative of an ephemeral existence because a fresh supplanting legal order cannot have such a circumscribed, if not skeletal, catalogue of functions. It is also the language reminiscent of emergency provisions in written constitutions, and emergencies are a phenomenon of transient nature. General Ironsi spoke of having been "formally invited" and this suggests that he acknowledged a superior authority because if he had been a law unto himself such a procedure would have been otiose.

But language and forms cannot prevail if the substance of the power is revolutionary. There is little doubt that the civil authorities did what they did because they were coerced by the Military power. The presence of such a threat was evinced by the abduction or assassination of several Ministers. No one would suggest that the civil authorities were in a position to refuse the investiture for which the General had asked. If the General had merely wanted to round up the rebels was there any need to abrogate the legislature and executives of five constitutions? Surely the defeat of the rebels was only a Military operation not requiring the mammoth powers that the General claimed for himself. Though there is no conclusive evidence of this, it is not unlikely that the General wrenched the rebellion from his subordinate majors and completed it himself. To allay opposition it was natural for him to

attempt to the best of his ability to give a display of constitutional punctilio. The fact that there was no law, person or institution at that moment that could effectively contradict the wishes of the General demonstrates that as far as power goes he was a law unto himself.

But granting that there was a revolution, might not the revolution have been legal in the sense that it came about as a result of the doctrine of necessity? This doctrine, it is submitted, is a genus that has three possible species. The classification is tentative since there has never been and may never be an exhaustive and universally accepted exposition of the doctrine. Necessity may operate to overthrow the constitution; it may merely change without crushing the legal order by making the grundnorm composite instead of monistic; it may be an implied integral part of the constitution in which case the abrogation or suspension of the express provisions would not logically be a detraction from the constitution but merely a substitution by the constitution itself of its implied provisions for its express terms: the constitution thus remains intact, the change having been effected by itself and on its own authority. Although the courts have only expounded the last, it is in fact the least plausible of the three, as it is proposed to show.

One may well ask what the distinction is between a revolution effected by force, though not necessarily violence, and one effected by the doctrine of necessity. A revolutionary regime of the first type owes its efficacy

to power and is thus limited only by the limits of power. A revolution created by the doctrine of necessity is correspondingly limited to the dictates flowing from circumstances of necessity. The latter regime exists, *ex hypothesi*, only so long as it is necessary for it to exist (the difficult question being who is to decide the period of the continuum of necessity). Though the consequences of the two conditions are clear, the conditions themselves are not susceptible of easy identification. Classification must take as its guide the degree to which constitutional elements have been overthrown. A complete or nearly total overthrow of all semblance of constitutionality compels the conclusion that the revolution is one based on naked power. But where institutions embodying the rule of law remain although the source of their authority is changed the revolution is less fundamental and may be regarded as one born of necessity. This distinction would have been rejected by Kelsen to whom all revolutions had the same results in law. He would draw no distinction between a revolution that introduced a regime that was *prima facie* permanent and one which introduces only a caretaker government which is merely the precursor of a more permanent one. Kelsen's theory, though indispensable to a comprehension of the phenomenon of revolution, is inadequate in the sense that it sometimes divorces drastically the situation in fact from the position in law. It is proposed to concur in his definition of what a revolution is but his genus of revolution might arguably be divided into more than one species, i.e.

into that which introduces an absolute regime of indefinite duration and that which merely creates one of limited powers and limited duration. Let us examine the 1688 Revolution of the United Kingdom in relation to the two types of revolution discussed above. The import of that event was canvassed by the Federal Court of Pakistan in Special Reference No. 1, 1955. Discussing the restoration of Charles II and the abdication (if such it was) of James II, the Chief Justice of Pakistan observed:²

Chitty in the 1820 Edition of his book, prerogatives of the Crown, states at p. 68, 'that the King is the first person in the nation..... being superior to both Houses in dignity and the only branch of Legislature that has a separate existence, and is capable of performing any Act at a time when the Parliament is not in being'.

At the same page referring to two memorable instances in which Parliament had assembled in an illegal manner, i.e. without the authority of the King, the reference being to the Parliament which restored Charles II and the Parliament of 1688 which disposed of the British Crown to William III, that learned author says, 'that in both these instances the necessity of the case rendered it necessary for the Parliament to meet as they did, there being no King to call them together and necessity supersedes all law.

It is thus clear that Chitty regarded the law of necessity as linking and legitimising events which would otherwise have severed all ties with their respective preceding legal orders and which would have been illegal under those orders.

2. (1955) (1) F.C.R. 439, p. 498.

The view of Chitty is however not the only authoritative one. There is also the opinion of Maitland which was also quoted by the Chief Justice of Pakistan. It reads as follows:³

Now certainly it was very difficult for any lawyer to argue that there had not been a revolution. These who conducted the revolution sought, and we may well say were wise in seeking, to make the revolution look as small as possible, to make it as like a legal proceeding as by any stretch of ingenuity it could be made. But to make it out to be a perfectly legal act seems impossible. Had it failed, those who attempted it would have suffered as traitors, and I do not think that any lawyer can maintain that their execution would have been unlawful. The convention hit upon the word 'abdicated' as expressing James's action, and, according to the established legal reckoning, he abdicated on 11th December, 1688, the day on which he dropped the great seal into the Thames. From that day until the day when William and Mary accepted the Crown, 13 February, 1689, there was no King of England. Possibly the convention would better have expressed the truth, if, like the parliament of Scotland, it had boldly said that James had forfeited the crown. But put it either way, it is difficult for a lawyer to regard the convention Parliament as a lawfully constituted assembly. By whom was it summoned? Not by a King of England, but by a Prince of Orange. Even if we go back three centuries we find no precedent. The Parliaments of 1327 and 1399 were summoned by writs in the King's name under the great seal. Grant that Parliament may depose King, James was not deposed by parliament; grant that parliament may elect a King, William and Mary were not elected by parliament. If when the convention met it was no parliament, its own act could not turn it into a parliament. The act which declares it to be a parliament depends for its validity of the Assent of William and Mary. The validity of that assent depends of their being King and Queen; but how do they come to be King and Queen?

3. (1955) (1) F.C.R. 439, p. 499.

Maitland therefore clearly treated the event of 1688 as a revolution, ridiculing the effort undertaken to give it a semblance of constitutional continuity. Adverting to the opinion of Chitty, the Chief Justice of Pakistan concluded:⁴

As a matter of strict law the Convention Parliament not having been summoned by the King was not a lawful Parliament, with the result that William was not a king and that being so, the act of settlement which regulated the succession to the throne was not a valid piece of legislation and none of the sovereigns who succeeded to the throne under the Act of Settlement was a legal sovereign and none of the laws to which they gave assent was a valid law. The only ground on which all that was illegal can be held to have been legal was, as Chitty observes, the necessity of the situation.

It is incongruous that the Chief Justice should cite two contrary opinions, i.e. those of Chitty and Maitland, and rely on Chitty to the exclusion of Maitland without explaining why he decided to choose one in preference to the other. Perhaps his reliance on Maitland, unlike his express adoption of Chitty's opinion, was implied and limited to the extent that Maitland had demonstrated the impossibility of reconciling the procedural attempts to obtain the mark of constitutionality, with legality in terms of the ordinary law of the land; and that when the ordinary law had been exposed by Maitland to be inadequate in the circumstances, an extraordinary law, the law of necessity, was the only law that could conceivably be invoked to legitimise the succession of William and Mary.

4. (1955) (1) F.C.R. 439, p. 500.

Of course, the Chief Justice had either overlooked or decided against the possibility of William and Mary being made sovereigns under the auspices of a new legal order. The Chief Justice might have confused as being identical the terms "legality" and "legal continuity": the former can exist even if the latter is broken. This appreciation of the distinction is fundamental to the understanding that it is not in the least necessary to sustain a legal order in perpetuity, just for the sake of making matters legal within a territory. No legal order has an imprescriptible right to be eternal. If legality is to be identified with legal continuity then revolutions can never be legitimised. The proposition has only to be stated to be seen to be absurd.

However, assuming that Chitty is right, the necessity of which he spoke might not be coincident with that expounded by the Chief Justice. Chitty merely asserted that Parliament in 1689 could meet although it was not summoned by the lawful king. He did NOT say that this meant that the old order had survived. Therefore Chitty's necessity could have been a doctrine which legitimised a revolution, this doctrine having operated outside the old order (and not implied in it), and operating as a separate source of authority after the old order's demise. It was suggested earlier in this discussion that a revolution made efficacious by the doctrine of necessity, as distinct from one so rendered by naked power, confers on the new regime limited powers and

limits its duration. The Convention of January 22, 1689, summoned by William, then still Prince of Orange, was a constituent of just such a regime - the other constituent being William, Prince of Orange. The Convention then offered the Crown jointly to William and Mary who accepted it and the Convention then resolved itself into the Convention Parliament. This Parliament lasted only one year (1689-1690) before it was dissolved by William and Mary. The Convention and the Convention Parliament were thus temporary instruments of the doctrine of necessity which subsisted between the order under James II and that under William and Mary. The regime of William and Mary began with their first Parliament which met on March 22, 1690 (as distinct from the Convention Parliament). With the commencement of their first Parliament the doctrine of necessity expired because that Parliament was not an interim legal entity and its functions were not simply to adjust matters so as to make way for the establishment of a new order. The second Parliament (the first, however, to be summoned by the writs of William and Mary), was, together with William and Mary, a new legal order because that Parliament commenced by declaring by statute that William and Mary were King and Queen and that the statutes made by the Convention Parliament were to be valid as from the date of their enactment. Had the new order begun^u with the Convention Parliament, in which case the latter would not have been merely precursory and temporary, such a declaration would have been meaningless. The efficacy of

the declaration was not challenged effectively and therefore that legal order's validity was thus presupposed in accordance with Kelsen's theory of the grundnorm. The 1688 Revolution, if it had come about by the doctrine of necessity, illustrated, and could only illustrate, one species of that doctrine, i.e. that the doctrine operates from without, and does not operate from within, a legal order. The basis for suggesting that the doctrine of necessity operates from without is that no legal order would contemplate, and this is especially true of one constituted in a written document, its own contradiction by mere implication of law, which implication springs from the fact that the known laws of the order have to be contravened temporally, so that the order could survive. The point we propose to make is that it is not open to invent a law to contradict known laws merely because the latter prove incompetent to govern events which have arisen. The solution of the problems created by a crisis of this nature should lie in the introduction of a new order which would avoid the obvious artificiality involved in implying new laws to sustain the old order. The new legal order, however, as has been observed, is transient and exists only so long as it is necessary for it to exist.

The second species of the doctrine (in the absence of decisive authority only tentatively so classified) also points its being extraneous to the old order but equally fundamentally asserts that it does not completely overthrow the old grundnorm but merely demotes the latter into a

constituent of the new one. The new grundnorm is composite, not monistic, its two constituents being the old order or, more accurately, the legal entity of which the old order was exclusively constituted, and the doctrine of necessity. The two constituents are sovereign in their own spheres although such laws as the doctrine of necessity shall require, if they should conflict with those emanating from the other constituent sovereign, prevail over the latter. This must not be understood as according predominance in the partnership to the doctrine of necessity because the latter is not free to detract from, add to or amend its co-constituent or its laws unless and until there shall exist circumstances of necessity demanding such detraction, addition or amendment. The decision in Lakanmi, if it is correct, can be relied upon to support this species of the doctrine, excepting that part of the decision which, incongruously, treats the doctrine as being implied in the 1963 constitution, i.e. the old order. In Lakanmi, Ademola C.J., said:⁵

Section 3(1) of the Decree No. 1 of 1966 does not envisage performance of legislative functions as a weapon for exercise of judicial powers, nor was it intended that the Federal Military Government should, in its power to enact Decrees, exceed the requirements or demands of the necessity of the case.

The passage indicates that the Chief Justice thought that the doctrine of necessity, whose instrument the Military Government was, was not paramount because that

5. Supreme Court, p.33.

doctrine required for its operation the existence of circumstances of necessity: whatever such circumstances required could be done, whatever they did not require could not. Such being the position, reasoned his Lordship, it would be fallacious to regard the Federal Military Government as a law unto itself.

The third species of the doctrine, the kind most favoured by judicial authority, is that rule in accordance with the dictates of necessity when the known or expressed laws of a constitution can no longer cope with a situation, is ineradicably implied in, or the substratum of, every constitution. The purpose of this rule is that constitutions will thus be able to respond to unforeseeable situations without having to be broken for want of remedies: thus in Special Reference No. 1 of 1955, the Chief Justice of Pakistan observes:⁶

The Governor-General claims in the Proclamation that he has acted in the performance of a duty which devolves on him as Head of the State to prevent the State from disruption, and the preliminary question that has to be considered is whether when we speak of rights and duties in the matter of preservation of States or their creation, foundation and dissolution, we are still in the field of law or in a region out of bounds to lawyers and courts. Having anxiously reflected over this problem I have come to the conclusion that the situation presented by the Reference is governed by rules which are part of the common law of all civilized States and which every written Constitution of a civilized people takes for granted.

6. (1955) (1) F.C.R. p. 439, at p. 494.

He proceeds:⁷

The best statement of the reason underlying the law of necessity is to be found in Cromwell's famous utterance. 'If nothing should be done but what is according to law, the throat of the nation might be cut while we send for someone to make a law'. Broom at p.1 of the 10th Edition of his legal Maxims says that the phrase salus populi suprema lex is based on the implied agreement of every member of society that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy or even sacrificed for the public good.

Also, in Mustapha Ibrahim v. A.G. for the Republic, Josephides, J. said:⁸

Faced with the non-functioning of the two superior courts of the land and the partial breakdown of the District Courts, the Government had to choose between two alternatives, viz. either to comply with the strict letter of the constitution (the relevant articles being unalterable under any condition), that is, cross its arms and do nothing but witness the complete paralysis of the judicial power, which is one of the three pillars of the State (vide Professor Alessi, ubi supra, at pages 218-9); or to deviate from the letter of the constitution, which had been rendered inoperative by the force of events (which situation could not be foreseen by the famous of the constitution), in order to do what was imperatively and inevitably necessary to save the judicial power temporarily until return to normal conditions so that the whole State structure may not crumble down. I have no hesitation in arriving at the conclusion that in these exceptional circumstances it was the duty of the Government through its legislative organ, to take all measures which were absolutely necessary and indispensable for the normal and unobstructed administration of justice. I agree with the submission of respondent's counsel that the measures taken should be for the duration of the necessity and no more.

7. 1955 (1) F.C.R. 439, p. 495.

8. 1964 Cyprus Law Reports, p.195, at pp. 267-268.

In passing, it may be queried whether the doctrine of necessity, in any form, contemplates in a country a condition of endemic turmoil, in view of the language connoting ephemerality almost invariably used in relation to laws associated with such a doctrine?

Also, do written constitutions which presuppose turmoil, for which they either expressly or impliedly make provision, to be a transient, if recurrent, phenomenon, become unsuited to, or inappropriate for states subject to conditions of perennial upheavals? One should be able to see in a written constitution the reflection of the laws by which the state concerned is ordinarily governed, but if the state is ceaselessly riven with chaos and the written provisions are thus placed in almost perpetual abeyance, the purpose of a written constitution is difficult to comprehend.

But let us now revert to the main theme. It may well be asked what practical differences exist between the species of the doctrine⁹ of necessity where it merely demotes the old order into a constituent of the new grundnorm, and that species of the doctrine which implies itself into an existing order so that even the contradiction or violation of that order's express provisions does not detract from that order's authority because the

9. It need hardly be said that the various suggested species of the doctrine are necessarily exclusive of one another, and thus can never operate concurrently on any one situation.

detract from the authority of the express provisions is made by the authority of the order's own implied authority, i.e. by the doctrine of necessity. The distinction between the two species must lie in the fact that in the case where the doctrine of necessity merely demotes the entity or phenomenon that hitherto exclusively comprised the old grundnorm into being only a constituent of the new grundnorm, that demoted entity CANNOT again exclusively comprise the grundnorm once the doctrine of necessity expires upon the restoration of stable government. But where the doctrine is not a phenomenon that joins a grundnorm by entering as an extraneous element, but is something inhering in a grundnorm all the time such that it prevails over the grundnorm's express provisions because, and only because, it is itself an implied provision of the grundnorm, and it is only activated when the express provisions prove inadequate, do these supplanted express provisions revive when stability is restored such that they lose their inadequacy, and the doctrine loses its function as an alternative pattern of rules? Does the doctrine have to make provision for the revival of the superseded express terms in the grundnorm before that doctrine departs? Or is there another intrinsic implication in all apparently exhaustively written constitutions to the effect that their express provisions are automatically to revive once the doctrine of necessity lapses? If all grundnorms are presumed to do their utmost to preserve themselves, is it not logical that they

should be taken to imply that their express provisions are to revive immediately upon the termination, through the restoration of stability, of the operation of the doctrine of necessity? Let us examine this with reference to the Nigerian situation. In that species of the doctrine of necessity where it joins a grundnorm from the outside and thus shares authority with the old grundnorm in the new constituent grundnorm, the 1963 Constitution would be demoted from its former exclusiveness of authority, but would that Constitution ascend to its former exclusiveness once the circumstances of necessity (e.g. political instability), on which alone the doctrine of necessity could operate, disappear? If Ademola, C.J.N., is correct in stating that the 1963 Constitution is only amendable "as the necessity arises", and that such provisions, e.g. those relating to the five legislatures and executives under the 1963 Constitution, are only "suspended", then once the constitutional emergency lapses through the emergence of constitutional stability, the 1963 Constitution will be restored, like a legal phoenix, to its former exclusive paramountcy, owing to the demise of its "partner" in power. But Ademola, C.J.N., is surely wrong. The 1963 Constitution has had its provisions overridden by an extraneous authority, i.e. the doctrine of necessity. The 1963 Constitution does not have the authority to revive that which an extraneous authority has put to death. The result is that the doctrine of necessity, in the case where it is not implicit in, but is extraneous to, a constitution, does not enable that constitution to revive upon

the doctrine's departure. That constitution, in this instance the 1963 Constitution, having most of its provisions abrogated, and being unable to revive them after the doctrine of necessity departs and leaves a vacuum, is necessarily destroyed upon the doctrine's departure. The solution to this contingency lies in the doctrine's abdicating its authority, as well as that of the provisions of the 1963 Constitution that have not been overridden to a new constitution, but the latter, by definition, will not be the 1963 Constitution.

But is the result the same with that species of the doctrine where it does not exist as an extraneous phenomenon asserting itself into the participation of authority with a formerly exclusive grundnorm¹⁰, but where, in contradistinction, it exists implicitly in a grundnorm. In this case, would the express provisions of the 1963 Constitution, now superseded by its own implicit provision, i.e. the doctrine of necessity, when that implicit provision ceases to operate owing to the expiration of the constitutional emergency? It is submitted that in this species of the doctrine of necessity the express provisions of the 1963 Constitution do revive, because they have NOT been overridden by an extraneous authority but by a provision implicit in the 1963 Constitution itself. What the 1963 Constitution has the power to abrogate, it has the power to revive. That Constitution's authority has not

10. i.e. when it is INTRINSIC, as distinct from when it is EXTRANEOUS.

been called in question by the operation of this species of the doctrine of necessity because the latter, being nothing more than an implied provision of that Constitution, cannot by the mere fact of its existence and operation affect that Constitution's authority, because, ex hypothesi, that Constitution is merely exercising its alternative, implied pattern of rules. When the latter are no longer necessary, they can be put in constitutional cold storage, and the Constitution can activate its express provisions again, or such of these as have been overridden by the doctrine of necessity in its operation. However, it must be conceded that authority in this field being exiguous, there is no precedent to illustrate the revival of overridden express provisions (except in cases where these are overridden by other express provisions in the same constitution, e.g. an express emergency power, with which we are not concerned) upon the cessation of the operation of the doctrine of necessity. We await events and the judicial response to them.

WAS THE SUPREME COURT COMPETENT TO ADJUDICATE IN
THE LAKANMI DECISION?

It is now proposed to digress from the field of substantive laws of revolution and necessity onto the question of the competence of municipal courts of law to adjudicate upon the constitutional expedients created from such legal upheavals.

First, let us advert to the case of revolutions as they are understood by Kelsen. When a legal order is

overthrown the cataclysm should displace the judiciary that existed as part of the old order: one cannot destroy the whole without destroying the constituents of that whole. If so, that same judiciary cannot survive into the new legal order, let alone be competent to decide upon the validity of that new order. But even if, through some twist of logic, the old judiciary survives into the new legal order, can it, as part of this new order, meaningfully sit in judgment on the validity of this order? Can a constituent confer validity on the whole? If the judiciary is validly part of the new legal order then this presupposes a valid legal order of which it could be a part, in which event the judiciary will not be in a position to pronounce on the validity of that phenomenon without whose existence it, the judiciary, would not have any existence at all; and that phenomenon with whose existence any pronouncement of the judiciary affirming the same would be unavoidably otiose. It is suggested that a municipal court cannot logically pronounce on the validity of a legal order because it is never detachable from, but always part of, a municipal legal order, which order should be a matter for presupposition rather than pronouncement.

Much the same point was made by the Attorney-General for Uganda in the case of Uganda v. Commissioner of Prisons, ex parte Matovu.¹¹ The Chief Justice of Uganda, in

11. (1966) E.A. 514.

regard to the point made by the Attorney-General,
paraphrased it thus:¹²

The learned Attorney-General then submitted that, although he would concede to the court as a Court of Record the right to raise any question relevant to the issues in controversy between the parties, he felt that in the matter of the kind under enquiry, the court was not competent to enquire into the validity of the Constitution on three grounds, namely:

1. That since the issues framed and referred to the court and the application and the affidavits filed by the applicant were based on the validity of the Constitution, it was not competent for the court to go behind those issues and the application, the validity of the Constitution not being one such issue; ¹³
2. That as judges of the High Court of Uganda, the court was precluded from enquiring into the legal validity of the Constitution by reason of their judicial oath; and
3. That the court had no jurisdiction to enquire into the validity of the Constitution because the making of a Constitution is a political act and outside the scope of the functions of the court.
- 3(a). Alternatively, counsel also submitted that the court was bound to declare the Constitution valid, if it should undertake to enquire into its validity, because the Constitution was the product of a successful revolution.

But even if it were possible to reason on the assumption that it was not illogical for a Municipal court to pronounce on the validity of Municipal legal orders, the

12. (1966) E.A. 514, p. 527.

13. The underlining is mine.

further issue arises whether the judiciary, being only one arm of government, should be placed in the ascendant by its being treated as competent to decide on the efficacy of the entire edifice of government. It is not easy to accept the suggestion that no revolution can be efficacious unless it receives the approval of that handful of men who at the crucial moment happens to constitute the court seised of the issue relating to the efficacy of the legal order. To acquiesce in the idea would be tantamount to saying that no legal order could be supplanted unless the supersession was one to which the judiciary would subscribe by way of a favourable decision. Acceptance of this status for the judiciary would also result in it being possible for the judiciary together with only one other arm of government to combine in effecting a revolution without the concurrence of the third. The judiciary would thus enjoy a constitutional elevation from which the other two arms of government are excluded. It is more plausible to regard a revolution as efficacious if the organisers are strong enough to impose their dictates and it is irrelevant which organ of government instigates it or even if the revolution stems otherwise than from an organ of government. Very often this is the case and the opinion of the judiciary in purported confirmation of a revolution, though imparting a semblance of legality, does not contribute to the efficacy of a legal order.

Is the judiciary an appropriate arbiter in assessing the validity of actions taken by the executive or legislature in situations where the constitution is not overthrown but sustained by that notion of the doctrine of necessity most favoured by judges? (Incidentally the partiality of the judiciary to a non-revolutionary concept of the doctrine of necessity may be suspected to stem from their desire to avoid involving their own status in the broils of constitutionality. Their own standing can still, however, be brought in issue where their identity is questioned, e.g. in Cyprus.) Are judges the best informed of people? Do they have easy access to facts without which their views of the situation to which the measures taken must be related would be incomplete? Besides even if the possession of vital information were not denied to the judiciary, the judicial process does not conduce to the expedition which emergencies usually require. The constant challenge to executive or legislative measures would hinder the steps essential to the restoration of normality or at least to the maintenance of law and order. The doctrine of necessity ordains all that is necessary and the broadness of this dictate would be lost sight of were it not to be regarded as inclusive of the possibility that it may be necessary to pass unnecessary measures if to do so would ensure the implementation of necessary measures. In fine, all executive or legislative measures born of an emergency should be presumed valid simply because the detection of non-essential provisions is not worth the delay thus

caused to essential provisions. In fact, violence would be done to the doctrine if essential measures were exposed to the delay consequent upon judicial scrutiny. It is necessary for necessary measures to be free from unnecessary delay, even if the swiftness of legislation this involves may result in the passing of a host of unnecessary measures. That this is so can be illustrated. Let it be assumed that only twenty out of one hundred measures are necessary. Judicial review would strike down eighty. But the time involved in this detection would militate against speed when speed would be required to prevent chaos. It would therefore be better to dispense with judicial review to allow all the one hundred measures to go through and thus ensure the early and effective operation of the twenty necessary measures, than to involve them all in litigation and delay the operation of the twenty necessary measures which would then have to undergo judicial scrutiny and obtain judicial approval. The period of the delay involved in judicial review argues against the retention of an independent judicial power in situations which are desperate enough to summon the doctrine of necessity. Furthermore, there is nothing known of the doctrine which excludes its operation from suspending the judiciary's own power of review. In Lakanmi the Supreme Court maintained that the right of the judiciary to review legislation had not been affected by the accession of the Military Government. Their Lordships apparently thought it too apodeictic a

point to require elaboration: we are thus deliberately left unenlightened as to why the Military Government's exclusion of judicial review of its decrees was thought unnecessary and therefore failed to qualify for validity under the doctrine. This judicial omission appears more pointedly intriguing in view of the court's readiness to concede, albeit only impliedly, the necessity for the supersession of the federal and state legislatures and executives. It is true that the judiciary has to decide whether or not the doctrine of state necessity can be invoked by those who wield the executive function which is by its nature expeditious in operation. But once the judiciary has decided that the doctrine should be invoked, thereat its function in this respect expires. The invocation of the doctrine is a confession of threatened or actual instability: once instability is acknowledged it is perilous to concede to the judiciary an absolute right of veto on all acts of government, as will necessarily be the case if the judiciary can strike down any instrument of government for being "unnecessary".

Another point that arises out of Lakanmi is that the coup in July did not affect the nature of the legal order, according to the court, though the point is only made sub silentio. This inference has been drawn because although the Decree No. 45 was passed after the July coup the court discussed the said decree exclusively with reference to the constitutional changes precipitated by the

January coup. The vital question should therefore be asked whether the coup in July was rightly treated as of no constitutional significance. The question is vital because on it centres the resolution of the issue of whether in May, 1967, Eastern Nigeria had seceded from or had merely refused to accede to the rest of Nigeria. If the July coup had split Nigeria into two distinct legal orders, then the territory known as Eastern Nigeria cannot be regarded as having subsequently seceded from Nigeria: secession on the relevant date could only be plausible if the July coup had not affected the territorial integrity of Nigeria.

Let us assess the case for the continued territorial integrity of Nigeria notwithstanding the coup of July, 1966. The paramount governing body in Nigeria since the coup in January has been the Supreme Military Council. The coup in July had resulted in the death of two members of that Council, viz., the Chairman, General Ironsi and the Governor of the Western Group of Provinces, Lt.-Col. Fajuyi. The two deaths could not have destroyed the Council. The Council was not dissolved merely because its Chairman and another member died - whatever might have been the cause of their deaths. If the Council could be so liquidated it would mean that the paramount governing body of Nigeria was absurdly fragile in that its existence was to be collateral with the lives of two men (Ironsi and Fajuyi). There is nothing in Decree No. 1, 1966, which defined the Supreme

Military Council, to suggest that any of its members were legally indispensable to the viability of the Council. It is true that the new Chairman of the Council (assuming its continued existence) was not unanimously voted in by its remaining members, but Decree No. 1 does not even allude to the procedure for the election of a new Chairman (or to the possibility of the first Chairman being replaced). There is therefore nothing to suggest that the election of a new Chairman had to be on a unanimous vote of the members. Bearing this in mind, the conclusion is reached that Lt.-Col. Gowon's election was not irregular. That being so, illegality lay on the head of those who refused to acknowledge his accession and proceeded to defy the authority of that body of which Lt.-Col. Gowon was Chairman. The nature of the Council, as defined in Decree No. 1, had not changed. In his assumption of office on August 1, 1966, Lt.-Col. Gowon said:¹⁴

I have been brought to the position today of having to shoulder the great responsibilities of this country and the armed forces with the consent of the majority of the members of the Supreme Military Council as a result of the unfortunate incident that occurred on the early morning of 29th July 1966.....
I intend to continue the policy laid down in the statement by the Supreme Commander on 16th January 1966 published on 26th January 1966.

Clearly, Lt.-Col. Gowon did not hold himself out as or even encourage the belief that he was, the acme of

14. Crisis and Conflict in Nigeria (vol. 1) by A.H.M. Kirk-Greene, Doc. No. 37, p. 196.

a new constitutional structure. He regarded himself as the successor to General Ironsi, a succession to which no obstruction in law can be found.

However, Lt.-Col. Gowon's speech was not treated by the Governor of the Eastern Group of Provinces, Lt.-Col. Ojukwu, as a speech of accession. On the same day as the new Chairman broadcast his speech, Lt.-Col. Ojukwu made a broadcast from Enugu, part of which reads:¹⁵

I have further conveyed to the Chief of Staff Supreme Headquarters, my fellow Military Governors and the Chief of Staff Army Headquarters, my understanding that the only intention of the announcement made by the Chief of Staff Army Headquarters today¹⁶ is the restoration of peace in the country whilst immediate negotiations are begun to allow the people of Nigeria to determine the form of their future association.

From this it is evident that the Eastern Governor no longer regarded the relationship between the centre and the groups of provinces as not having been changed by the July coup but that it had become a kind of loose association the nature of which was yet to be decided through negotiation.

He also challenged the propriety of Lt.-Col. Gowon's assumption of office, in the same speech:

..... the Chief of Staff, Supreme Headquarters, Brigadier Ogundipe..... as the next most senior officer, in the absence of

15. Kirk-Greene, Doc. 38, pp. 198-199.

16. Lt.-Col. Gowon's speech of accession.

the Supreme Commander, should have assumed command of the Army.....

To the assertion just quoted it may be retorted that the Supreme Military Council would have been within its rights had it seen fit to appoint even a sergeant as Supreme Commander.

Another difficulty that emerges from the subsequent recriminations between the Centre and the Eastern Region is the nature of the objection which Lt.-Col. Ojukwu raised against his antagonists at the Centre. Did he object to the authority of the Supreme Military Council as such or only to the validity of Lt.-Col. Gowon's position as Chairman? That the gravamen was founded on the latter is manifest from what he said to Lt.Col. Gowon on the first day of the Aburi¹⁷ discussions:¹⁸

How can you ride above people's heads and sit in Lagos merely because you are at the Head of a Group who have their fingers poised on the trigger? If you do it you remain forever a living example of that indiscipline which we want to get rid of because tomorrow a Corporal will think because he has his finger on the trigger he could just take over the company the company Commanding the company and so on. I knew then that we were heading for something terrible. Despite that and by force of circumstances as we did talk on the telephone I think twice, you brought up the question of Supreme Command and I made quite plain my objections, but despite those objections you announced yourself as the Supreme Commander. Now, Supreme Commander by virtue of the fact that you head or that you are acceptable to people who had mutinied against their Commander, kidnapped him and taken him away? By virtue

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17. This was a meeting of Nigeria's military leaders in Ghana in their effort to resolve the crisis precipitated by the coup in July, 1966.
18. Kirk-Greene, Doc. 81, p. 321, at pp. 324-325.

of the support of Officers and men who had in the dead of night murdered their brother officers, by virtue of the fact that you stood at the head of a group who had turned their brother officers from the Eastern Region out of the barracks which they shared? Our people came home, there are circumstances which even make the return more tragic. Immediately after I had the opportunity to speak to you again, I said on that occasion that there had been too much killing in Nigeria and it was my sincere hope that we can stop these killings. I said then, and have continued to say that in the interest of peace I would co-operate with you to stop the killing but I would not recognise.

I would not recognise because I said we have a Supreme Commander who is missing. I would not recognise and to underline the validity of that claim of mine you appointed another Officer, be he senior to you, Acting Governor in the West, presumably acting for the Governor who was then abducted and that I saw no reason why your position would not then be acting. From there I think we started parting our ways because it was clear that the hold on Lagos was by force of conquest. Now, these things do happen in the world, we are all Military Officers. If an Officer is dead..... we drop the national flag on him, we give him due honours and that is all. The next person steps in. So, the actual fact in itself is a small thing with Military men but hierarchy, order is very important, discipline are sine qua non for any organisation which prides itself for being called an Army. So, the mutiny had occurred, the mutineers seemed in control of the North, the West, Lagos. By international standards when that does happen then a de facto situation is created immediately where whoever is in a position gets a de facto recognition himself in a position over the area he controls. In this situation, Nigeria resolved itself into three areas. The Lagos, West and North group, the Mid-West, the East. What should have been done is for us to get round to discuss the future, how to carry on in the absence of our Supreme Commander.

From the extract quoted it is obvious that Lt.-Col. Ojukwu was adamant in his assertion that Lt.-Col. Gowon was neither the Supreme Commander nor Chairman of the Supreme Military Council. However, by speaking of General Ironsi as their Supreme Commander, Lt.-Col. Ojukwu unavoidably acknowledged the continued existence of the Supreme Military Council. When Lt.-Col. Ojukwu spoke of the July coup as having divided the Army Command into three areas of control it was a soldier's way of stating that since the Supreme Military Council had been suspended pending the election of a new Chairman, who would also be Supreme Commander, the supreme command of the army was in abeyance and therefore the only form of control conceivable was that of de facto command. Also evident from the extract quoted is his desire to resolve this de facto impasse into a de jure hierarchy of command through the negotiations at Aburi.

That the East had not seceded from Nigeria is clear from the following exchange:¹⁹

Lt.-Col. Hassan (Governor of the North), speaking to Lt.-Col. Ojukwu:

.....you command the East, if you want to come into Nigeria come into Nigeria and that is that.

To which Lt.-Col. Ojukwu replied tersely:

I am not out.

If Lt.-Col. Ojukwu did not regard the East as having seceded from Nigeria consequent on the July coup,

19. Kirk-Greene, Doc. 81, p. 321, at p. 327.

then his opposition to the dictates of the Supreme Military Council was illegal, an illegality avoidable only on the ground of secession. This is so because of the combined effect of his double admission (extracted inforentially) that the Supreme Military Council (as distinct from the Gowon regime - a distinction he implicitly draws) which governed the whole of Nigeria was still existing and that the East was still part of Nigeria in the sense that it had not seceded, though not in the sense that the East was still as closely associated with the centre as it had been before the coup in July. Even if General Ironsi was alive at the time, Lt.-Col. Gowon was acknowledged as the new Supreme Commander, the appointment would not have been vitiated thereby because a decision of the Supreme Military Council did not require the Concurrence of the Supreme Commander.²⁰ Decree No. 1 does not say that the incumbent of the Chairmanship of the Council has to be expressly displaced before his successor can be appointed. The Council's appointment of a successor automatically removes the former incumbent, otherwise the absurd conclusion will be forced of the Chairman being only removable with his own consent.

20. S. 8(4) Decree No. 1966:

Each of the Councils established by this section may regulate its own procedure and, subject to its rules of procedure, may act notwithstanding any vacancy in its memberships or the absence of any member.

The Councils mentioned are the Supreme Military Council and the Supreme Military Council and the Federal Executive Council.

Although the fact must not be lost sight of that Lt.-Col. Ojukwu had advocated a loose confederation at Aburi²¹, that fact cannot vitiate the paramountcy of the Supreme Military Council that assembled at Aburi because by the very act of submitting his proposal to and urging its acceptance by the Council Lt.-Col. Ojukwu implicitly conceded the Council's right to alter the form or structure of Government in Nigeria, a right that would not have been the Council's to possess and exercise if it had not been the paramount authority in Nigeria.

The conclusion is therefore arrived at of the illegality, in terms of the authority of the Supreme Military Council of which Lt.-Col. Ojukwu was a member, of the act of secession which Lt.-Col. Ojukwu on behalf of Eastern Nigeria, committed on May 30, 1967.

APPENDIX

The Supreme Military Council purported to reverse the Lakanmi decision by passing Decree No. 28, 1970. This decree is otiose irrespective of whether that decision is right or wrong. If it is right then obviously Decree No. 28 can have no validity because the rightness of that decision means precisely that Decree No. 28 is not entitled to claim that the court is not right. If the decision has been wrongly arrived at, then the decree serves no purpose because it merely repeats what Decree No. 1, 1966,

21. Kirk-Greene, Doc. 81, p. 321, at pp. 334-335.

had already claimed for the Federal Military Government.

This Decree, its logical superfluity notwithstanding, must be treated as important because two learned authors have felt able to acquiesce in its claims.²² Mr. Ojo expresses his satisfaction with the conclusiveness of the Decree, thus:²³

Happily, the present writer is saved the bother of writing a conclusion to this brief review. As legitimately expected, the Federal Military Government, whose legislative competence or rather (as some would say) whose legality has been challenged by the Supreme Court pronouncement, reasserted itself by restating what in our view is obvious, that is, its right to unfettered and unlimited legislative competence.

It is to be noticed that the entire process of assertion by Decree No. 28, 1970, is founded on the belief that that Decree has the authority to assert what it asserts. The Decree is plainly circuitous in that it can only have the authority to assert what it asserts if what it asserts is efficacious in law and what it asserts can only be so efficacious if it has the authority so to assert. The Decree cannot overturn the court's decision if the court is right in its opinion that judicial power of review exists in Nigeria. But if the court's conclusion is wrong, it can only be so as being

22. See Abiola Ojo; (1971) I.C.L.Q. 117, p. 134. Also, T.O. Elias; (1971) The Nigerian Law Journal 129, pp. 140-131.

23. Ojo, op.cit., 134.

contrary to Decree No. 1, 1966, and to Decree No. 28, 1970, because the latter does not lay a larger claim to authority than the former has already done.

To illustrate the circuitry of Decree No. 28, 1970, the latter will be quoted in full. It reads:²⁴

WHEREAS the military revolution which took place on January 15, 1966, and which was followed by another on July 29, 1966, effectively abrogated the whole pre-existing legal order in Nigeria except what has been preserved under the Constitution (Suspension and Modification) Decree 1966 (1966 No. 1):

AND WHEREAS each military revolution involved an abrupt political change which was not within the contemplation of the Constitution of the Federation 1963 (hereafter referred to as 'the Constitution of 1963'):

AND WHEREAS by the Constitution (Suspension and Modification) Decree (1966 No. 1) there was established a new government known as the 'Federal Military Government' with absolute powers to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever and, in exercise of the said powers, the said Federal Military Government permitted certain provisions of the said Constitution of 1963 to remain in operation as supplementary to the said Decree:

AND WHEREAS by section 6 of the said Constitution (Suspension and Modification) Decree 1966, no question as to the validity of any Decree or any Edict (in so far as by section 3(4) thereof the provisions of the Edict are not inconsistent with the provisions of a Decree) shall be entertained by any court of law in Nigeria: 25

24. Decree No. 28, 1970.

25. Since Decree No. 1, 1966, has already made an identical assertion, is not Decree No. 28, 1970, guilty of repetition? If the Supreme Court could ignore Decree No. 1, 1966, surely the same treatment might await Decree No. 28, 1970. Authority is not the child of Repetition.

AND WHEREAS by Schedule 2 of the said Constitution (Suspension and Modification) Decree 1966 the provisions of a Decree shall prevail over those of the unsuppressed provisions of the said Constitution of 1963:

NOW THEREFORE THE FEDERAL MILITARY GOVERNMENT hereby decrees as follows:-

1. - (1) The preamble hereto is hereby affirmed and declared as forming part of this Decree.

(2) It is hereby declared also that -

(a) for the efficacy and stability of the government of the Federation; and

(b) with a view to assuring the effective maintenance of the territorial integrity of Nigeria and the peace, order and good government of the Federation,

any decision, whether made before or after the commencement of this Decree, by any court of law in the exercise or purported exercise of any powers under the Constitution or any enactment or law of the Federation or of any State which has purported to declare or shall hereafter purport to declare the invalidity of any Decree or of any Edict (in so far as the provisions of the Edict are not inconsistent with the provisions of a Decree) or the incompetence of any of the governments in the Federation to make the same is or shall be null and void and of no effect whatsoever as from the date of the making thereof. 26

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26. If there is no authority on the part of the Federal Military Government to enact this provision, such authority cannot be acquired by a provision purporting to assert possession of this authority. Furthermore, the Preamble to the Decree is no less an exercise in fatuity. If the coups in January and July, 1966, were not revolutions in law, how could a mere assertion in a Decree make them so? The assertion is only valid if what the Preamble states is correct but the Preamble (even as part of the Decree) cannot of itself invest its own assertion with correctness.

(3) In this Decree -

(a) 'decision' includes judgment, decree or order of any court of law, and

(b) the reference to any Decree or Edict includes a reference to any instrument made by or under such Decree or Edict.

2. This Decree may be cited as the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1970 and shall apply throughout the Federation.

MADE at Lagos, this 9th day of May, 1970.

PART IIICONSTITUTIONAL BREAKDOWN IN SOUTHERN RHODESIACHAPTER 5THE CONSTITUTIONAL BACKGROUNDA. THE 1923 CONSTITUTION

Southern Rhodesia was annexed as a British Colony on July 30, 1923. A constitution was provided for it by Letters Patent in the same year. The constitution's preamble gave a succinct recitation of events leading to the establishment of "Responsible Government" in Southern Rhodesia. The preamble read as follows:¹

Whereas by the Southern Rhodesia Order in Council, 1898, as added to, altered or amended by divers further Orders in Council, provision was made for the administration of the government of certain territories of Africa under Our protection and known as Southern Rhodesia:

And whereas by an Order in Our Privy Council bearing date the 30th day of July, 1923, and known as the Southern Rhodesia (Annexation) Order in Council, 1923, it is provided that the territories within the limits of the Southern Rhodesia Order in Council, 1898, and known as Southern Rhodesia, shall, from and after the coming into operation of the said Order, be annexed to and form part of Our Dominions, and shall be known as the Colony of Southern Rhodesia:²

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1. Letters Patent (Southern Rhodesia Constitution), given on August 25, 1923; published October 1, 1923.
 2. My own underlining.

And whereas We are minded to provide for the establishment of Responsible Government, subject to certain limitations hereinafter set forth, in Our said Colony:.....

This constitution granted to the colony a Legislative Assembly.³ This Assembly was constituted of thirty members, all of whom were elected.⁴ The general power of the Legislative (i.e. the Legislative Assembly and the Governor) was expressed in the following manner:⁵

It shall be lawful for Us and Our successors, by and with the advice and consent of the Legislature,⁶ subject to the provisions of these Our Letters Patent, to make all Laws, to be entitled 'Acts', which shall be required for the peace, order and good government of the Colony:.....

The legislature was empowered to amend most of the constitutional provisions; however, the power of amendment could only be exercised by it if a two-thirds majority vote of all the members of the Legislative Assembly was obtained.⁷ The authority to amend the 1923 Constitution was denied to the Legislature⁸ in respect of those sections relating to the Governor's right to reserve Bills, to Native Administration, and to the salary of the Governor.

3. S. 3 of the 1923 Constitution.

4. S. 3 of the 1923 Constitution.

5. S. 26(1) of the 1923 Constitution.

6. The correct terminology would have been "Legislative Assembly" because the Sovereign was part of the "Legislature" itself.

7. Second proviso to S. 26(2) of the Southern Rhodesia Constitution.

8. S. 26(2) of the 1923 Constitution.

Notwithstanding any power that the Legislative Assembly might have, the Governor was empowered, if he should receive Royal Instructions directing him to do so, to reserve for the consideration of the Crown any Bill whatsoever with which the Legislative Assembly might present him.⁹ Even where the Crown did not instruct the Governor to reserve a Bill, he was enjoined by the Constitution to reserve Bills which discriminated against the natives¹⁰ as well as those which, when enacted, would have the effect of amending the Constitution.¹¹ There were also minor items of legislation where reservation was mandatory on the Governor.¹² The Crown had an absolute power to disallow, within one year of the Governor's assent¹³, any law enacted in the Colony.¹⁴

This state of affairs persisted until 1953 when Southern Rhodesia became a constituent Territory of the Federation of Rhodesia and Nyasaland.¹⁵ It is not proposed

9. S. 28, 1923 Constitution.

10. S. 28(a), 1923 Constitution.

11. S. 28(b), 1923 Constitution.

12. S. 18(d), (e), 1923 Constitution.

13. This would exclude those Bills reserved, and assented, to by the Crown.

14. S. 31, 1923 Constitution.

15. The Federation was created under the Federation of Rhodesia and Nyasaland (Constitution) Order in Council (1953); S. 1 1953, No. 1199. The Order in Council was made under the Rhodesia and Nyasaland (Federation) Act, 1953; 1 & 2 Eliz. II, c. 30.

to comment on the Federation because there was no change by this act in the status of Southern Rhodesia in relation to the United Kingdom. The Federation was dissolved in December, 1963, and the territory of Southern Rhodesia reverted to the status in the constitutional spectrum it had enjoyed before joining the Federation.¹⁶ One important difference was that Southern Rhodesia's status, in relation to the United Kingdom, had in the meantime been enhanced by the 1961 Constitution which came into effect towards the end of 1962, although the territory remained essentially a self-governing colony.

B. THE 1961 CONSTITUTION

(i) GENERAL

The Constitutional status enjoyed by Southern Rhodesia since 1923 was described in CMND. 1399 (Southern Rhodesia Constitution: Part I - Summary of Proposed Changes 1961) at page 3 as follows:

The Constitution of 1923 conferred responsible government on Southern Rhodesia. Since then it has become an established convention for Parliament at Westminster, not to legislate for Southern Rhodesia on matters within the competence of the Legislature Assembly of Southern Rhodesia, except with the agreement of the Southern Rhodesia Government.

16. The Federation was dissolved by The Federation of Rhodesia and Nyasaland (Dissolution) Order in Council (1963); S. 1 1963, No. 2085. The Order in Council was made under the Rhodesia and Nyasaland Act (1963); 11 & 12 Eliz. II, c. 34.

17. S. 1 1961, No. 2314.

In 1959, the Southern Rhodesia Government proposed to the United Kingdom Government that the Constitution of Southern Rhodesia should be revised, with a view to transferring to Southern Rhodesia the exercise of the powers vested in the United Kingdom Government.

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The proposed new Constitution, which is based on the conclusions of the Conference, will reproduce many of the provisions of the existing Constitution. It will eliminate all the reserved powers at present vested in the Government of the United Kingdom, save for certain matters set out in paragraph 50¹⁸; and it will confer upon Southern Rhodesia wide powers for the amendment of her own Constitution. It will also contain a number of important additional features, such as a Declaration of Rights and the creation of a Constitutional Council, designed to give confidence to all the people of Southern Rhodesia that their legitimate interests will be safeguarded.

Certain points merit observation. The statement spoke of responsible government having been granted in 1923 and of a convention not to legislate on matters within the competence of the Southern Rhodesia Legislative Assembly "since then". There is no quarrel with "then" being

18. Paragraph 50 reads:

"Under the new proposals, Southern Rhodesia will be free to make amendments to any sections of the Constitution without reference to the United Kingdom, with the exception of amendments which would affect:

- (a) the position of the Sovereign and the Governor;
- (b) the right of the United Kingdom Government to safeguard the position regarding:
 - (i) international obligations;
 - (ii) undertakings given by the government of Southern Rhodesia in respect of loans under the Colonial Stock Acts."

identified with 1923. But what does "since 1923" mean? The word "since" in that phrase is obviously used as a preposition, but the Oxford English Dictionary gives two meanings for that preposition:

1. Even or continuously from (a specified time, etc.) till now.
2. During the period between (a specified time) and now; at some time subsequent to or after.

It is thus seen that if the first meaning is used the convention was established in 1923. If the second meaning was what the United Kingdom had in mind then the convention developed some time between 1923 and the date of the statement (viz. 1961). If the convention was created with imminent propinquity to 1961 the status of Southern Rhodesia before the 1961 Constitution would of course not measure to the elevation which it would claim had the convention been established from 1923. One is left to speculate on whether the equivocality of expression was due to inadvertence. If the United Kingdom Government had desired to express that the convention dated from 1923 it could have employed the unmistakable "It then became an established convention" instead of the ambiguous "Since then it has become an established convention". It is however incontestable that whichever meaning be ascribed to "since then" no United Kingdom Government had mentioned the existence of such a convention prior to 1961. The concept of constitutional conventions was by no means embryonic or arcane in 1923 and it is intriguing why, if it had been

established in 1923, it was never officially acknowledged until thirty-eight years after its creation, not forgetting its crucial significance in regard to the territory's status along the spectrum that spans the stages of constitutional metamorphosis.

Another point that attracts attention is that although the British Parliament is not to trench upon the competence of the Legislative Assembly except with consent, the consent necessary is not required of the Assembly but of the Government. This confers on the Government a right to surrender the exclusive competence of the Assembly - assuming the efficacy of the convention.

A minor observation to be made is that "the competence of the Legislative Assembly" should have read "the competence of the Legislature" because the Legislative Assembly, of itself, has no power to legislate.

Attention is drawn to another passage in the statement:

In 1959, the Southern Rhodesia Government proposed to the United Kingdom Government that the Constitution of Southern Rhodesia should be revised, with a view to transferring to Southern Rhodesia the exercise of the powers vested in the United Kingdom Government. 19

This expression of the request suggests that Southern Rhodesia either desired independence under a new constitution

or that it desired at least the granting of a constitution capable of providing a basis for a future independence constitution. Any suggestion that seeks to refute Southern Rhodesia's wishing to associate independence with the proposed new constitution, cannot survive the unambiguous terms on which the new constitution was requested, namely, that the request was made "with a view to transferring to Southern Rhodesia the exercise of the powers vested in the United Kingdom Government." If the Southern Rhodesia Government had desired a status for Southern Rhodesia less than that of an independent or imminently independent state it would not have initiated the negotiation on the understanding that it was with a view to the transmission of plenary authority to the territory. This must also have meant that Southern Rhodesia would withdraw from the Central African Federation since the possession of exclusive plenary powers would have been incompatible with its then status as a region in the federation. The White Paper (CMND.1399) is made ambiguous by an unwarranted omission regarding the Southern Rhodesia Government's view that the new constitution should embody a translation of governing authority. The United Kingdom Government did not indicate in the White Paper whether or not the Southern Rhodesia Government's view was acceptable. The transfer in the Southern Rhodesia Government's view, as stated by the United Kingdom Government, related to "the powers vested in the United Kingdom Government." The powers requested to be transmitted were specified by the definitive article "the" and

were not made subject to any exceptions. The powers in fact granted were qualified with United Kingdom reserve authority and the right of disallowance to certain minor categories of legislation.²⁰ Because of the difference between the unqualified nature of the request and the qualified granting of the request it is difficult to discover whether the United Kingdom Government shared the desire that the constitution granted should be the basis of the independence constitution. Can this discrepancy between the powers requested and the powers granted be taken as indicative of the United Kingdom Government's dissent from the view that the constitution granted was given on the understanding that it should form the foundation for an independence constitution to come in the near future?

That the United Kingdom Government had no intention of granting the 1961 constitution on the understanding that it was to constitute the basis for the independence of Southern Rhodesia, was made clear in the House of Commons, although not in the form of a refutation, by the Secretary of State for Commonwealth Relations, Mr. Duncan Sandys, on November 15, 1963. Mr. Sandys had said:²¹

20. S. 1 No. 2314 (1961): ss. 111 and 32.

21. Hansard, House of Commons, Vol. 684, col. 585. It is regretted that in the period 1961-1962, no indication was given as to whether or not the 1961 Constitution was to be granted as the basis for a future independence constitution. In retrospect the silence, though perhaps not inadvertent, has proved inconvenient in the ascertainment of the United Kingdom Government's intention at the time.

We have made it clear that we are prepared to grant independence to Southern Rhodesia in the same circumstances²² as we have granted it to other British territories. In particular, we look for a widening of the franchise²³ so as to give greater representation to the Africans who constitute nine-tenths of the population, but have less than a quarter of the seats in Parliament.

A related issue, touched on earlier, is the convention of non-interference in the internal affairs of Southern Rhodesia which, though conceded by the United Kingdom to exist, has not been particularly well defined by the latter both as regards its scope and the time of its recognition. It is a pity that even the spokesmen for the Government of the day in the two Houses of Parliament have not achieved any measure of consistency on this matter. On November 8, 1961, a spokesman for the Government, Mr. Braine, speaking of the prospect of amending or replacing the 1961 Constitution (referred to by the spokesman as "a new Constitution"), stated:²⁴

If after a new Constitution were granted it was desired to amend it in a way not authorised by the Order in Council, a further Act of our Parliament would be necessary. There would, of course, be no question of the British Government asking Parliament to legislate in a situation like that without the agreement of the Southern Rhodesia Government. That follows a convention clearly set out in the introduction to the

22. My own underlining.

23. My own underlining.

24. Hansard, House of Commons, Vol. 648, cols. 1049-1050.

White Paper, Cmnd. 1399²⁵ which the House debated in June.

Much in the same vein was a statement made by Mr. R.A. Butler (the Home Secretary) on May 8, 1962. Mr. Butler opined:²⁶

...The British Government cannot by themselves introduce a new constitution for Southern Rhodesia, nor can they set aside the 1961 Constitution. This would be contrary to the convention, which has operated for nearly forty years,²⁷ of non-interference in the internal affairs of Southern Rhodesia.

The length of time for which Mr. Butler alleged the convention to have existed will be discussed later. For the moment it is proposed to examine what is meant by the word "cannot" as used by Mr. Butler in the opening clause "... the British Government cannot". Speaking on March 27, 1962, in the House of Lords, of a similar convention relating to the Federation of Rhodesia and Nyasaland, the Lord Chancellor, Lord Kilmuir, said:²⁸

As a matter of pure law, I entertain no doubt that the power of the United Kingdom Parliament to legislate how it wishes for the Federation remains unfettered. However, Her Majesty's Government would not breach the terms of an

25. It will be recalled that Cmnd. 1399 spoke of non-interference in those matters where the local legislature was competent to pass laws; the spokesman here, while referring to, and purporting to adopt the position established in, the White Paper, had in fact EXTENDED the convention of non-interference except with consent, to matters in regard to which the local legislature was incompetent; in this instance, the enactment of a constitution to replace the 1961 Constitution.

26. Hansard, House of Commons, Vol. 659, col. 237.

27. My own underlining.

28. Hansard, House of Lords, Vol. 238, col. 957.

understanding which has been clearly agreed with the Federal Government.

It will be noticed that the statement embodies two sentences. They must be clearly separated. The first is an exposition of the authority of the United Kingdom Parliament in regard to a convention adherence to which would limit that authority. The point made by the Lord Chancellor is that the authority of Parliament is such that the existence of a convention does not entail adherence to the latter to the extent that such adherence diminishes the authority of Parliament. In other words, as the second sentence of Lord Kilmuir's statement makes clear, the only significance of a convention of this nature resides in the political good faith of the United Kingdom Government. Such a convention restricts only to the extent that the good faith of the Government allows itself to be inhibited by it. It does not depreciate the legal authority of Parliament.

The opinion of Lord Kilmuir has been endorsed by a subsequent Lord Chancellor: Viscount Dilhorne. In the course of a debate on the Federation of Rhodesia and Nyasaland in general, and of the convention of non-interference in the Federation's internal affairs in particular, Viscount Dilhorne, on December 19, 1962, said:²⁹

As a matter of law, it is in my view clear beyond any doubt³⁰ that the United Kingdom Parliament can, by the passage of an Act,

29. Hansard, House of Lords, Vol. 245, col. 1217.

30. My own underlining.

revoke or amend the Order in Council which created the Federation there have been suggestions that we really are not free, as a matter of law, to legislate on this matter. I must confess that I have never heard that seriously asserted on behalf of the Federation. I have never heard it suggested that, as a matter of pure law,³¹ the United Kingdom Parliament has not the power to legislate to provide for the secession of Nyasaland if it chooses to do so.

Having seen the effect in law of a restraining convention, it is proposed to identify the period in which the convention relating to Southern Rhodesia originated. In debate at the Committee Stage of the Rhodesia and Nyasaland Bill (required for the dissolution of the Federation of Rhodesia and Nyasaland), the First Secretary, Mr. R.A. Butler made this statement:³²

The Government take the line that there has been a 40-year convention, since 1923, with Southern Rhodesia that we should not intervene in their constitutional matters.

This statement was, in the same debate, corrected by the Attorney-General (Sir John Hobson) both in respect of the period for which the convention was said to have existed, and of the scope of the convention. The Attorney-General made the correction in two statements. The first read:³³

With respect to my right hon. friend the First Secretary, he was not quite accurate in saying that the convention had existed

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- 31. The position might be different, not as a matter of pure law but as a matter of pure politics.
 - 32. Hansard, House of Commons, Vol. 681, col. 412. (July 16, 1963.)
 - 33. Hansard, House of Commons, Vol. 681, col. 414. (July 16, 1963.)

for 40 years. It arises out of 40 years' history and it has coalesced or congealed into the formality of a convention much more recently. 34

After an interruption from a Member, the Attorney-General continued: 35

I think that my right hon. friend is right in saying that 40 years of history of Southern Rhodesia has brought about a situation which was first recognised in 1961³⁶ - namely, that as from 1961³⁷ we in this Parliament have recognised that the convention has put us in a situation in which it would not be right for this Parliament to legislate for matters which are within the competence of the Legislature of Southern Rhodesia 38 without the consent of the Southern Rhodesian Parliament. 39

34. My own emphasis.

35. Hansard, House of Commons, Vol. 681, col. 415. (July 16, 1963.)

36. Almost certainly this is a reference to the opening statement in CMND. 1399 on the proposals for the 1961 Constitution.

37. My own underlining.
This is much clearer than the ambiguous phrase in the White Paper (CMND. 1399) "since then (1923)".

38. The Attorney-General confines the First Secretary's broad "constitutional matters" to matters within the local legislature's competence. (The underlining in Footnotes 38 and 39 is mine.)

39. This is the only known instance of a Government spokesman referring to the consent of the Southern Rhodesia Parliament, as distinct from that of the Southern Rhodesia Government.

Having now examined the status and scope of the convention, it is proposed to make one final point in regard to the latter: the convention, even in the realm of political practice only, was by no means unconditionally binding in terms of political good faith. That this was so was made plain by the Secretary of State for Commonwealth Relations, Mr. Arthur Bottomley, in the House of Commons on March 8, 1965, when speaking of his visit to Southern Rhodesia. He said:⁴⁰

I made it quite clear⁴¹ that so long as there was no unconstitutional action⁴² this Government would respect the convention.

The position in constitutional law is the same. After the "unconstitutional action" alluded to by Mr. Bottomley had actually materialized, an authority on constitutional law, Professor S.A. de Smith, contributed his appraisal thus:⁴³

A convention may lose binding force because of a major change in circumstances.⁴⁴ In 1961 the United Kingdom Government agreed that it would be contrary to convention for Parliament to legislate for Southern Rhodesia on any matter within the competence of the Southern Rhodesian Legislature without the consent of the Southern Rhodesian Government. In 1965 the Government of Southern Rhodesia made a unilateral (and unlawful) declaration

40. Hansard, House of Commons, Vol. 708, col. 38.

41. i.e. to the Government of Southern Rhodesia.

42. The underlining is mine.

43. Constitutional and Administrative Law: S.A. de Smith: 1971: Longman Group Ltd.: London. The passage is taken from page 63.

44. My own underlining.

of the colony's independence. The United Kingdom Parliament immediately re-asserted plenary legislative authority in relation to Southern Rhodesia. This could NOT ⁴⁵ reasonably be construed as a breach of convention; the survival of the convention presupposed the continuance of a constitutional relationship which the Government of Southern Rhodesia had repudiated. ⁴⁶

It is only logical that since the consent to be obtained by the United Kingdom Government, in respect of that class of legislation expressed in the convention, was obtainable only from the Southern Rhodesia GOVERNMENT (thus making the latter an integral part of the very definition of the convention), it was sufficient for the destruction of the convention that the Southern Rhodesia GOVERNMENT had, through its Unilateral Declaration of Independence, attempted to proclaim Southern Rhodesia to be independent, and thus to be no longer in need of the convention, whose function of serving as a shield for her from the legal powers of the United Kingdom Parliament could have no conceivable meaning in respect of an "independent" Southern Rhodesia. It is important that the demise of the convention should not be treated as a sanction or penalty against Southern Rhodesia. The convention was destroyed because an integral part of its definition - the Southern Rhodesia GOVERNMENT⁴⁷ - was no

⁴⁵. My own emphasis.

⁴⁶. My own underlining.

⁴⁷. This could only have referred to a LEGAL Government.

longer in existence. The position would have been different if the consent in question was instead to be obtainable from the Southern Rhodesia LEGISLATURE.⁴⁸ If the consent was required to be obtained from the Southern Rhodesia LEGISLATURE, then it would have been the latter, and not the Southern Rhodesia Government, that was an integral part of the definition of the convention. This then being the position, an illegal declaration of independence by the Southern Rhodesian GOVERNMENT would not of itself have been able to affect the definition of the convention in any way. In strict law, the absence of a Government does not destroy the powers of the Legislature. If the Legislature of Southern Rhodesia had not subsequently supported U.D.I. (but in fact it did), and if the consent to legislate was to be obtained from the Southern Rhodesia LEGISLATURE, instead of, as was the case, from the Southern Rhodesia GOVERNMENT, then the legislation by the United Kingdom Parliament to re-assert its authority

48. This would have been the case if the English Attorney-General, Sir John Hobson, had been right when he spoke of the consent having to be obtained from the "Southern Rhodesian Parliament" (see footnote 39 of this Chapter). Even now, it is not absolutely certain that Sir John Hobson was wrong. His statement (Hansard, House of Commons, Vol. 681, col. 415 - July 16, 1963) is considered inaccurate only because no other Government spokesman had ever expressed the view that the consent was to be obtained from the Southern Rhodesia Legislature.

after U.D.I. was in clear violation of the convention, and in that sense it would have been unconstitutional. But no court in the United Kingdom would have been able to declare the Act of Parliament void, the clear breach of the convention notwithstanding.

Thus Professor de Smith writes:⁴⁹

No form of judicial redress is obtainable purely for a breach of convention. And in the eyes of the courts, Parliament is competent to legislate in unequivocal disregard of conventional limitations on the exercise of its powers.

(ii) WAS THE 1961 CONSTITUTION AN ACCURATE EXPRESSION OF THE WHITE PAPER?

It has been asserted that the terms of the White Paper⁵⁰ were different from the provisions of the 1961 Constitution, so as to make the latter an act of political bad faith.⁵¹ The divergence is alleged to be caused in the enactment of S. 111 which withdraws the sections

49. de Smith, op.cit., p. 49.

50. In this Chapter "the White Paper" refers to CMND. 1399. It does not refer to CMND. 1400, which contained the detailed provisions of the proposed constitution.

51. Rhodesia and Independence: by Kenneth Young: Dent and Sons, Ltd.; London: 1969: pp. 53-56.

specified therein⁵² from the amending power of the Southern Rhodesia Legislature. It is submitted, however, that the inconsistency only amounted to the incompetence of the Legislature to change its own components. The Legislature (as defined in S. 6 of the 1961 Constitution) comprised the Queen and the Legislative Assembly. The inclusion of S. 6 in S. 111 meant that the Queen was secured against being excluded from the Legislature, and this provision was on all fours with the exclusionary proviso embodied in paragraph 50(a) (CMND. 1399) prohibiting local amendments which would affect "the position of the Sovereign and the Governor". Obviously the possible exclusion of the Queen from the Legislature would affect her position. However, insofar as this provision imposed a constitutional embargo on the enlargement of the Legislature by the Legislature (e.g. the addition to itself of a Second Chamber), it can be held to have exceeded the limit of the reservations made in the White Paper.

The remaining sections reserved in S. 111 are in strict conformity with the exception expressed in paragraph

52. Ss. 1, 2, 3, 5, 6, 29, 32, 42, 49, and S. 111 itself. Ss. 1, 2, 3, 5, relate to the power and remuneration of the Governor. S. 6 defines the composition of the Legislature. S. 29 governs the Assent to Bills. S. 32 provides for the power to disallow a very limited range of laws. S. 42 controls the exercise of the executive authority. S. 49 relates to the prerogative of mercy. S. 111 withholds from the Legislature the power to amend itself as well as the other sections which it specifies. It reserves this amending authority to the Queen exercisable by Order in Council.

50 of the White Paper. Section 29 related to the Governor's assent to Bills and thus came squarely within the exception in the phrase "the position of the Sovereign and Governor⁵³;" Section 32 empowered the Crown to disallow legislation in Southern Rhodesia which would be inconsistent with the United Kingdom's position in right of Southern Rhodesia in regard to international obligations and with undertakings by the Government of Southern Rhodesia in respect of loans under the Colonial Stocks Act. This section was also within that part of the reserve power embodied in paragraph 50(b) of the White Paper. Section 42, the ante-penultimate section specified in S. 111, related to the executive authority of Southern Rhodesia which it provided should rest in the Sovereign. This section was unquestionably connected with the position of the Sovereign and the Governor, and thus also within the exception envisaged in the reservation of United Kingdom authority expressed in paragraph 50(a)

53. CMND. 1399; paragraph 50(a).
The whole of paragraph 50 read:

"Under the new proposals, Southern Rhodesia will be free to make amendments to any sections of the Constitution without reference to the United Kingdom, with the exception of amendments which would affect:

- (a) the position of the Sovereign and the Governor;
- (b) the right of the United Kingdom Government to safeguard the position regarding:
 - (i) international obligations;
 - (ii) undertakings given by the Government of Southern Rhodesia in respect of loans under the Colonial Stock Acts.

of the White Paper. Finally, S. 49 was in respect of the prerogative of mercy. This was certainly within the exception withholding the competence of the Southern Rhodesia Legislature to amend. It is thus seen that apart from S. 6 the allegations of inconsistency between the pledge in the White Paper and its redemption in the 1961 Constitution are chimerical.

(iii) DETAILS OF PROVISIONS

(a) THE EXECUTIVE AUTHORITY

The Southern Rhodesia Constitution of 1923 (constituted by Letters Patent on September 1, 1923) reserved to the Crown the power to amend or revoke many sections embodied therein.⁵⁴ The White Paper⁵⁵ setting out the proposed changes to that constitution promised that the new constitution would "eliminate all the reserved powers at present vested in the Government of the United Kingdom, save for certain matters set out in paragraph 50⁵⁶;" the most important power retained by the United Kingdom and consequentially the most extensive limitation to the authority of Southern Rhodesia was the prohibition embedded in Ss.111 and 105 of the 1961 Constitution⁵⁷ imposed on the amending authority of Southern

54. S.61 of the Southern Rhodesia Constitution Letters Patent 1923.

55. CMND. 1399.

56. CMND. 1399, p. 3.

57. S.1 1961, No. 2314.

Rhodesia. The most significant of the sections the power to amend which was denied to the territory was S. 42, read in conjunction with S. 2.

Section 42 provides:

The executive authority of Southern Rhodesia is vested in Her Majesty and may be exercised on Her Majesty's behalf by the Governor or such other persons as may be authorised in that behalf by the Governor or by any law of the Legislature.

S. 2 states:-

The Governor shall have such powers and duties as are conferred or imposed on him by or under this Constitution or any other law, and such other powers (not being powers to be exercised in his personal discretion) as Her Majesty may from time to time be pleased to assign to him. Subject to the provisions of this Constitution and of any law by which any such powers or duties are conferred or imposed, the Governor shall do and execute all things that belong to his office according to such Instructions, if any, as Her Majesty may from time to time see fit to give him.

Provided that the question whether or not the Governor has in any matter conformed to or observed any such Instructions shall not be enquired into in any court.

It is observable of S.2 that there are three ways in which powers and duties may be vested in the Governor:

1. Those conferred by or under the Constitution;
2. Those given by or under any other law;
3. Those transmitted by way of Royal Instructions.

It is further clear the Royal Instructions are subordinate to the first two sources of authority because the Governor can only obey Instructions "Subject to the

provisions of this Constitution and of any law by which any such powers or duties are conferred or imposed."

This means that should the advice of the Governor's Council conflict with that contained in the Royal Instructions, the Royal Instructions have to give way. This is because S. 45⁵⁸ provides that "as the case may require" the Governor shall act in accordance with the advice of the Governor's Council or the appropriate Minister, except in cases where the Governor is entitled to exercise a personal discretion or where the Constitution otherwise prescribes. S. 45 being a section in the Constitution is in terms of S.2 paramount over the Royal Instructions. In view of the manifest subordination of the Royal Instructions it is surprising to learn of the implicit significance attributed to them by an author in the following extract:⁵⁹

58. The relevant part of S. 45 reads:

"45. - (1) In the exercise of his functions, the Governor shall act in accordance with the advice of the Governor's Council or the appropriate Minister, as the case may require, except where under this Constitution or any other law, he is required to act in accordance with the advice of any other person or authority:

Provided that the Governor shall act in accordance with his own discretion-

- (a) in the exercise of the power of dissolving the Legislative Assembly conferred on him by subsection (2) of section 34; and
- (b) in the appointment of Prime Minister in pursuance of subsection (1) of section 43, but in such cases the Governor shall observe the constitutional conventions which apply to the exercise of similar powers by Her Majesty in the United Kingdom."

59. THE CONSTITUTIONAL HISTORY AND LAW OF SOUTHERN RHODESIA 1885-1965: CLAIRE PALLEY: O.U.P.: 1965: p. 719.

The Governor, who represents the Crown, has such powers and duties as Her Majesty may from time to time be pleased to assign him and, in exercising these powers, he is required to act in accordance with Instructions given him from time to time by Her Majesty. The retention of these powers was apparently insisted on at the Southern Rhodesia Constitutional Conference in February 1961, by Mr. Sandys, who pointed out that, although the Governor normally acted on the advice of the local Executive Council, the Sovereign retained power to give Instructions to Her Governor until such time as the country became fully independent.

Even more insupportable is this later suggestion:⁶⁰

It will also be possible in the event of a fundamental constitutional crisis or action touching on Imperial interest for the Governor to be instructed not to accept the advice of his Executive Council. ⁶¹

In support of the assertion made immediately above, Palley, in her footnote No. 3 on the same page, states:

Section 2 read with section 45(1) makes it clear that this would not be unconstitutional by the employment of the phrase 'except where under this Constitution or any other law... he is required to act in accordance with the advice of any other person or authority'.

It is important to focus attention on the fact that S. 2 of the Constitution, in enumerating the sources of the Governor's authority, makes it plain that the term "Royal Instructions" is not to be comprehended within the

60. PALLEY: op.cit.: p. 720.

61. In this context the terms "Executive Council" and "governor's Council" can be used interchangeably because the former is a creature of convention and has no authority under the 1961 Constitution although the Prime Ministers and such Ministers as he selects for the Governor's Council comprise the memberships of the latter Council (S.44 of the 1961 Constitution).

term "this Constitution or any other law". This is known to be the case because S. 2 on two occasions mentions the Royal Instructions (once expressly and once by implication) as a separate source of the Governor's authority from the other two sources expressed in the term "this Constitution or any other law". The point being made by Professor Palley in her quotation of the exception to the requirement that the Governor is to act on the advice of the Governor's Council is that the Royal Instructions come within that exception, namely, "except where under this Constitution or any other law..." the Governor is required to act on the advice of a person or authority other than the Governor's Council or the appropriate Minister. But the exception does NOT include the Royal Instructions because, as S. 2 of the Constitution makes clear, the term "Royal Instructions" is outside the term "this Constitution or any other law". Therefore, the Royal Instructions, not coming within the expression "this Constitution or any other law", cannot constitute an exception to the Governor's obligations to act on the advice of his Council. Thus we see that the Royal Instructions can only be complied with by the Governor if the Governor's Council does not offer contrary advice, or where the Governor's Council has not already advised in regard to the relevant issue.

To reinforce the proposition that the Governor cannot allow Royal Instructions to override his obligation to act on the advice of his Council merely by virtue of the

exception, which Palley points to in support of her argument, embodied in S. 45(1), it only requires attention to be drawn to the nature of the alternative authority with which the Governor is to comply in accordance with the exception. The exception speaks of the Governor's acting in accordance with the ADVICE of any other person or authority. Now, if the exception is meant to include Royal Instructions, is it not immediately incongruous that Her Majesty the Queen should be described as tendering ADVICE to her own representative, the Governor? Even if the arrangement of the sources of the Governor's authority made in S. 2 is not explicit enough to convince one that the Royal Instructions do not come within the term "this Constitution or any other law" and hence not within the exception expressed in S. 45(1), surely the intractable incongruity of describing Royal INSTRUCTIONS as a form of ADVICE should place beyond the reach of contradiction the proposition that the exception expressed in S. 45(1) to the obligation of the Governor to act on his Council's advice does not include the Royal Instructions he receives from the Queen because Her Majesty has never been known to tender ADVICE to her Governors.

It is submitted that where the Crown desires to override contrary advice tendered to the Governor by his Council it should avail itself of the authority it enjoys in terms of S. 111, and make an Order in Council to amend

S.2 so as to provide for the paramountcy of the Royal Instructions over the other sources of the Governor's authority. In the absence of such legislation the Crown cannot, in terms of the 1961 Constitution, override the advice to the Governor tendered by his Council or the appropriate Minister.

Whatever may have been the intention of the United Kingdom Government in regard to the position of the Governor, such intention, if it is not supportable within the terms of the 1961 Constitution, cannot in any way affect the status of Southern Rhodesia.

In regard to the authority of the Governor, Professor Palley makes a final point. She observes:⁶²

Quite apart from any Royal Instructions, since the Governor is guardian of the Constitution, it would be his duty to exercise Crown reserve power where the preservation of the Constitution was at stake. Thus a Governor faced with 'a coup d'etat under the forms of law' should refuse assent.

Quite apart from what "the preservation of the Constitution" is supposed to mean when none of its provisions are in danger of violation (as conceded by the illustration "a coup d'etat under the forms of law") it is mildly intriguing to speculate on how the Governor, who is created by, and whose powers are expressly defined in, the Constitution is able to summon to his aid a source of authority completely

62. Palley: op.cit.: p. 721.

unknown to the Constitution. That the Governor is a creature of the Constitution is made clear in S. 1(1) of the Constitution. Part of S. 1(1) reads:

There shall be a Governor in and over the Colony of Southern Rhodesia who shall be appointed by Her Majesty by Commission under Her Sign Manual and Signet and shall hold office during Her Majesty's pleasure.

Surely a creature cannot be treated as possessing endowments exceeding those which it has pleased its creator to bestow upon it, even if the extra attributes claimed for it are claimed in solicitous pursuit of the creator's salvation.

(b) THE AMENDING PROCEDURE

The Legislature of Southern Rhodesia was made competent to amend the provisions of the 1961 Constitution with the exception of S. 111 and the sections enunciated therein. S. 111 reserved to the Crown power to amend, add to or revoke S. 111 itself as well as any of the sections it contained. The exclusion of S. 111 and the Southern Rhodesia Legislature was effected by S. 150, which decreed:

Subject to compliance with the other provisions of this Constitution, a law of the Legislature may amend, add to or repeal any of the provisions of this Constitution other than those mentioned in Section 111:

Provided that no Act of the Legislature shall be deemed to amend, add to or repeal any provision of this Constitution unless it does so in express terms. 63

S. 111 provides:⁶⁴

Full power and authority is hereby reserved to Her Majesty by Order in Council to amend, add to or revoke the provisions of sections 1, 2, 3, 6, 29, 32, 42, 49 and this section, and any Order in Council made by virtue of this section may vary or revoke any previous Order so made:

Provided that the power and authority herein reserved to Her Majesty shall not be exercised for the purpose of amending this section or adding to it a reference to any section of this Constitution not included in this Section on the appointed day.

Ordinary provisions of the Constitution could be amended in accordance with S. 106:⁶⁵

No constitutional Bill shall be deemed to be passed by the Legislative Assembly unless at the final vote thereon in the Assembly it receives the affirmative votes of not less than two-thirds of the total membership of the Assembly.

Specially entrenched provisions, however, require a more rigorous method of amendment, as S. 107⁶⁶ makes plain:

- (1) For the purposes of this Constitution, all the provisions thereof enumerated in the Third Schedule shall be specially entrenched provisions of the Constitution together with any other provision which may hereafter be declared by any future amendment of the Constitution to be such a provision.

(2) Any constitutional Bill which contains any provision for amending, adding to or repealing any specially entrenched provision of the Constitution and which is passed by the Legislative Assembly in accordance with the requirements of section 106, shall not, become law unless either -

64. 1961 Constitution, S. 111.

65. 1961 Constitution, S. 106.

66. 1961 Constitution, S. 107.

(a) such provision is approved in a referendum by a majority of those voting in each of the four principal racial groups of this Constitution; or

(b) an Address is presented to the Governor praying him to submit the Bill to Her Majesty for assent in pursuance of section 109. 67

The reserve power⁶⁸ of the British Crown was thus reduced drastically in the 1961 Constitution in that the positive aspect of it relates only to the amendment or revocation of S. 111 and the sections therein enumerated, and the negative aspect consists in the power to refuse assent to Bills to amend specially entrenched sections in the absence of the referenda stipulated in S. 107(1)(a). This is unlike the Crown's position established in the 1923 Constitution. Under that Constitution the Governor had power to initiate legislation. This was embodied in S. 19 which read:⁶⁹

The Governor may transmit by message to the Legislative Council⁷⁰ and the Legislative Assembly the draft of any Bill which it may

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67. S. 109 prescribes that where the Legislative Assembly passes a motion to present an Address to the Governor praying him to submit the Bill to Her Majesty for assent, the motion must be passed by not less than two-thirds of the total memberships of the House after the Governor has been instructed by the Crown that it consents to the motion being passed. Strictly, this does not mean that the motion, once passed, is binding on the Crown but in fact this is so because if the latter had been averse to the motion it would not have consented to its being passed.
68. I have not included the Disallowance Power which does not affect internal government save as regards legislation in relation to Southern Rhodesia Government Stock (see S. 32).
69. S. 19, 1923 CONSTITUTION LETTERS PATENT (MADE ON SEPT. 1 1923: TOOK EFFECT FROM OCT. 1, 1923).
70. Although provision for the creation of such a body was made in the Constitution, the power was never invoked. Thus the Legislative Council never came into existence.

appear to him desirable to introduce, and all such drafts shall be taken into consideration by the said Council and Assembly, as the case may be, in such convenient manner as shall be provided in that behalf by Rules of Procedure.

Under the 1923 Constitution the Governor had a right to refuse assent to Bills that was only qualified by subordination to the Constitution (none of whose provisions, however, attenuated this right) and the Royal Instructions. Thus the Governor in effect could in his discretion decline assent to a Bill unless the Crown instructed him otherwise.⁷¹ The Governor could, unless contrary Instructions were given to him, have the Bill reserved instead of refusing assent.⁷² In addition, the Governor had a list of legislation where reservation was declared to be mandatory.⁷³ An item on the list included constitutional amendments, reading:⁷⁴

Any Law which may repeal, alter or amend, or is in any way repugnant to or inconsistent with such provisions of these Our Letters Patent, as may under these Our Letters Patent be repealed or altered by the Legislature;

The section enumerating the items of legislation where reservation was mandatory was declared unamendable.⁷⁵

71. S. 27, 1923 Constitution.

72. S. 27, 1923 Constitution.

73. S. 28, 1923 Constitution.

74. S. 28(b), 1923 Constitution.

75. S. 26(2), 1923 Constitution.

The power of disallowance, so restricted under the 1961 Constitution, was absolute under the 1923 Constitution. The relevant section in the 1923 Constitution read:⁷⁶

It shall be lawful for Us, Our, heirs and successors, to disallow any Law within one year from the date of Governor's assent thereto, and such disallowance, on being made known by the Governor by Speech or Message to the Legislative Council and the Legislative Assembly, or by Proclamation in the Gazette shall annul the Law from the day when the disallowance is so made known.

The section relating to the power of disallowance was not, however, unamendable by the Southern Rhodesia Legislature, although, being a constitutional amendment it would under S. 28(b) have had to have the Crown's approval by way of reservation. The disallowance power under the 1961 Constitution was, however, declared unamendable by the Southern Rhodesia Legislature since, the reservation power no longer extending to cover all constitutional amendments⁷⁷, it would otherwise not have been adequately protected for the paramount authority in London.

(c) THE CONSTITUTIONAL COUNCIL

Yet another novel feature emerging from the 1961 Constitution was the Constitutional Council.⁷⁸

76. S. 31, 1923 Constitution.

77. The power to reserve Bills could be invoked as an alternative to the racial referenda required as one of the conditions for the amendment of specially entrenched sections in the 1961 Constitution (S. 107).

78. Created and described in Chapter VII of the 1961 Constitution (Ss. 73-91).

(i) MEMBERSHIP

The Council was constituted of a Chairman and eleven elected members.⁷⁹ Membership was to include two Europeans, two Africans, one Asian, one person of the Coloured community, and two persons who shall be either an advocate or attorney of the High Court of Southern Rhodesia of not less than ten years' standing. The Chairman's appointment was to be made by the Governor on the advice of the Chief Justice after consultation with the puisne judges, and his removal was to be effected in the kind of procedure employed to dismiss the Chief Justice.⁸⁰ No member of the Council was eligible to hold a second term of office.⁸¹ The ordinary members of the Commission were dismissible by the Governor only when the latter, upon believing them to have conducted themselves improperly as members of the Council, had entrusted to a Commission of Inquiry the investigation of his suspicion and received from such Commission confirmation of his belief.⁸²

(ii) FUNCTIONS

Intermediate between the final reading of a Bill and its presentation to the Governor for his assent the Speaker of the Legislative Assembly was required to submit an

79. S. 73, 1961 Constitution.

80. S. 74, 1961 Constitution.

81. Ss. 74(3) and 75(2)

82. S. 79, 1961 Constitution.

authenticated copy of the Bill to the Constitutional Council which, unless it applied for extension, had to make a report to the Governor and the Speaker, within thirty days, directing their attention to provisions in the Bill, if any, that would contravene the Declaration of Rights if the former were enacted.⁸³ Such an objection can only be overridden by a motion requesting assent addressed to the Governor and passed by at least two-thirds of the total membership of the House. Otherwise, it could only be passed after six months from the date of its presentation to the Council, and such passage could be effected with an ordinary majority of those present and voting.

No Bill, however, need be presented to the Council if before its translation to the latter the Prime Minister certified in writing that it was so urgent that the public interest enjoined its immediate enactment.⁸⁴ The Council could also quash statutory instruments unless there were subsequent confirmatory resolutions of the Assembly when the Council's adverse reports were laid before it.⁸⁵

In relation to legislation of the Legislature prior to the Council's inception the latter could only make adverse reports to the Governor and Speaker who would have

83. S. 79, 1961 Constitution.

84. S. 85, 1961 Constitution.

85. S. 86(4), 1961 Constitution.

to lay them before the Assembly.⁸⁶

(4) THE DECLARATION OF RIGHTS.⁸⁷

The Chapter commences with the preamble:

Whereas it is desirable to ensure that every person in Southern Rhodesia enjoys the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin, political opinions, colour or creed, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -

- (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
- (b) freedom of conscience, of expression, and of assembly and association; and
- (c) respect for his private and family life,

the following provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to the limitations of that protection contained in those provisions.

It should be noticed that the Declaration of Rights was specially entrenched in terms of S. 107 of the 1961 Constitution.

Section 57 embodied the right to life. The obvious exception to it was the imposition of the death sentence by a court of law. Reasonable force used in the following situations was a defence to the otherwise violation of the right:

86. S. 87, 1961 Constitution.

87. Chapter VI (Ss. 57-72), 1961 Constitution.

- (a) the defence of any person from violence or for the defence of property;
- (b) the effecting of a lawful arrest or the prevention of the escape of a person lawfully detained;
- (c) the suppression of a riot, insurrection or mutiny or the dispersal of an unlawful gathering;
- (d) the prevention of the commission by the person of a criminal offence;
- (e) death in a lawful act of war.

Section 58 ensures the right to personal liberty except in cases of restriction and detention⁸⁸, as well as the usual court orders.

The most significant subsections in the individual's favour are (3) and (4) which read:

- (3) Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language which he understands, of the reasons for his arrest or detention.
- (4) Any person who is arrested or detained-
 - (a) for the purpose of bringing him before a court in execution of the order of a court or an officer of a court; or
 - (b) upon reasonable suspicion of his having committed or being about to commit a criminal offence,

and who is not released shall be brought without undue delay before a court; and if any person arrested or detained as mentioned in paragraph (b) of this subsection is not tried within a reasonable time, then, without prejudice to any further proceedings which may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

88. S. 58(1)(k), 1961 Constitution.

The right to personal liberty here did not amount to much. It could have been detracted from to any extent by law. The law attenuating it need not have been reasonable in any respect, What the right to liberty as here defined conferred was merely such liberty as the law chose to allow. It is submitted that the section was nothing more than a declaration against anarchy and not a declaration against arbitrary government because the latter had only to commend to the Legislature such legislation as would render criminal conduct which it thought undesirable. It is lamentable that no criterion was created to restrict the power of the Legislature to restrict the personal liberty of the individual.

Provision against slavery, servitude and forced labour was found in S. 59. It did not define what these were but carefully elaborated on what forced labour was not. It was not labour imposed by a court order or a detention order if in the latter it is required in the interests of hygiene or education or rehabilitation. Nor is labour in the armed forces to be treated as prohibited by the section. Labour necessitated by public emergencies was likewise excepted. Excluded was labour forming part of normal communal or other civic obligations. It is suggested that this section is fair.

Section 60 was important in that it prohibited inhuman treatment by the authorities. The section read:

(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

(2) No treatment reasonably justifiable in the circumstances of the case to prevent the escape from custody of a person who has been lawfully detained shall be held to be in contravention of this section on the ground that it is degrading.

(3) Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the doing of anything by way of punishment which might lawfully have been so done in Southern Rhodesia immediately before the appointed day.

The section was adjudicated upon in the Privy Council in Runyowa v. R.⁸⁹. The appellant had been sentenced to death for setting fire to a building in contravention of S. 33A(1) of the Law and Order (Maintenance Act, 1960). The death penalty was known in Southern Rhodesia before the 1961 Constitution became operative. On S. 60 the Board had this to observe:⁹⁰

The problem before their Lordships is that of construing the particular words of section 60 of the 1961 Constitution. No person is to be subjected (a) to torture, (b) to inhuman or degrading punishment or (c) to inhuman or degrading treatment. As a matter of construction their Lordships (in agreement with the judgements in the appellate division of the High Court of Southern Rhodesia in GUNDU AND SAMBO's case) consider that the ban that is imposed is upon any such type or mode or description of punishment as is inhuman or degrading. Since it is not suggested that the death penalty is of such a type or mode of description it follows that the argument advanced

89. 1967 A.C. 26.

90. 1967 A.C. 26, at pp. 47-50.

on behalf of the appellant must fail. So far as this conclusion needs any support it amply finds it in the provision contained in subsection (3). The result of that subsection seems clearly to be that nothing contained in any written law (e.g., the Law and Order (Maintenance) Act) is to be held in contravention of section 60 to the extent that it authorises the doing of anything by way of punishment which might under any provision of any law passed by the legislature of Southern Rhodesia have been done by way of punishment in Southern Rhodesia immediately before the appointed day. The death penalty was one of the modes or types or descriptions of the punishments known in Southern Rhodesia before the appointed day (see S. 360 under the heading "Punishments" in the Criminal Procedure and Evidence Act). Furthermore, the words "the doing of anything by way of punishment" would seem to denote a type or form or method of punishment.

.....

The provision contained in section 60 of the Constitution enables the court to adjudicate as to whether some form or type or description of punishment newly devised after the appointed day⁹¹ or not previously recognised is inhuman or degrading but it does not enable the court to declare an enactment imposing a punishment to be ultra vires on the ground that the court considers that the punishment laid down by the enactment is inappropriate or excessive for the particular offence. Harsh though a law may be which compels the passing of a mandatory death sentence (and may so compel even where aiding and abetting or assisting is by acts which, though proximate to an offence, are relatively trivial), it can be remembered that there are provisions (e.g. section 364 of the Criminal Procedure and Evidence Act in Southern Rhodesia) which ensure that further consideration is given to a case.

It is not proposed to dissent from the conclusion arrived at by the Board. The criticism will be directed at the section itself. Subsection (3) by authorising the

91. The day on which the 1961 Constitution became operative.

doing of anything that might have been done prior to the commencement of the 1961 Constitution prevented the section invalidating any mode of punishment or other treatment that was permissible before the section became operative. Therefore such forms of punishment and other treatment as existed before the "appointed day" were either to be treated as (i) conclusively not amounting to torture, or inhuman or degrading punishment or other treatment; or (ii) torture, inhuman or degrading punishment or other treatment permissible by law. Either interpretation would obviate contravention, by previous modes of punishment or other treatment, of S. 60.

The conclusion can be drawn by way of illustration. If after the commencement of the 1961 Constitution a law was to be passed prescribing that any one person guilty of murdering, by himself, ten persons or more, should have his left hand amputated, this law would be struck down because (a) it was not known before the commencement of the Constitution and (b) it was degrading punishment. This would be manifestly unjust because a mass murderer should not deserve the tender concern of the section. On the other hand, if a law subsequent to the appointed day was to provide the death penalty for the theft of half a loaf of bread or more, the section would not serve to quash it because the death penalty was known to the law prior to the appointed day.

It is submitted that the section ought to have made it clear that whether or not a punishment or other treatment was torture, inhuman or degrading punishment or

other treatment must be assessed in the light of the circumstances on which punishment or other treatment was based. Even if "torture" and "degrading punishment or other treatment" could not be properly ascertained by being measured against the circumstances, "inhuman punishment or other treatment" certainly could. It would be inhuman to amputate a hand for petty theft but would it be so for mass murder? But as the section is drafted it would make no difference, at least so the Board thought. It is noteworthy that S. 60 is not subject to modification or suspension even during periods of public emergency, unlike some of the other rights in the Declaration.⁹²

The above is a highly selective conspectus on the Declaration of Rights. It only attempts to direct attention to some of its more controversial provisions.

The Declaration of Rights was enforceable through the High Court and ultimately to the Judicial Committee of the Privy Council. The court, however, was not to exercise its powers under this subsection if it was satisfied that adequate means of redress for the contravention alleged were or had been available to the person concerned under any other law.⁹³

If the applicant could obtain a certificate from the Constitutional Council that stated that his case was a

92. S. 69, 1961 Constitution.

93. S. 71(4), 1961 Constitution.

proper and suitable test case, then any sums regarded by the court as having been reasonably incurred by him in the litigation were to be refunded to him by the Constitutional Council out of the Consolidated Revenue Fund.⁹⁴

94. S. 71(6), 1961 Constitution.

CHAPTER 6THE CONSTITUTIONAL BREAKDOWN(1) SOUTHERN RHODESIA ASKS FOR INDEPENDENCE

Southern Rhodesia first formally requested independence from the United Kingdom Government in March, 1963.¹ In that month the Southern Rhodesia Prime Minister had talks with the First Secretary of the United Kingdom Government in the course of which the Southern Rhodesia Prime Minister broached the matter of his country's independence in the light of the impending, albeit yet unannounced, dissolution of the Central African Federation of which Southern Rhodesia formed a territorial unit. In a subsequent letter from Mr. Winston Field (the Southern Rhodesia Prime Minister) to Mr. R.A. Butler (the British First Secretary), the former stated his position:²

At our interview this morning when you informed me of the British Government's decision taken as a result of the talks held this week in London, I raised the question of the full independence of Southern Rhodesia in the light of the situation as you described it. You invited the Southern Rhodesia Government to attend later in the year in Rhodesia a Conference with the Governments concerned to determine the broad lines of a new association between Southern Rhodesia and Northern Rhodesia. I emphasised that the nature of the British Government's decision amounted to a recognition of Northern Rhodesia's right to secede from the Federation and, therefore, this raised the vital issue for Southern Rhodesia of its own independence. I have now carefully considered

1. CMND. 2000; CMND. 2073.

2. CMND. 2000; p. 3; CMND. 2073, p.3.

the Southern Rhodesian attitude towards the Conference and I wish to state that the Southern Rhodesia Government will not attend a Conference unless we receive in writing from you an acceptable undertaking that Southern Rhodesia will receive its independence concurrently with the date on which either Northern Rhodesia or Nyasaland is allowed to secede, whichever is the first.³

You were kind enough to state that you thought this attitude was not unreasonable but that it would not be possible for you to give an immediate decision on Southern Rhodesia's independence; and that you were ready to receive from my Government a formal application for this independence on the terms I have outlined.

I, therefore, submit in this letter a formal application,⁴ now that both Nyasaland and Northern Rhodesia have been given the right to secede from the Federation that Southern Rhodesia should be given its full independence on the first date when either one or the other territory is allowed to secede or obtains its independence.

On April 9, 1963, the First Secretary replied to the Southern Rhodesia Prime Minister's letter, a reply which was not directed to answering the main question of Mr. Field's message. The latter, it will be recalled, had requested from the First Secretary an answer as to whether or not he was prepared to give the desired undertaking. In his reply, Mr. Butler was caution itself. He acknowledged Southern Rhodesia's right to eventual independence when such an assurance was not sought, for the obvious reason that no one doubted that her non-independent status

3. The underlining is my own.

4. The underlining is my own.

was not to be an immutable condition. He went on to say "that Southern Rhodesia, like the other territories, will proceed through the normal processes to independence."⁵ This seems to indicate that if the "normal processes" could be completed before the dissolution of the Federation, then independence would be granted upon dissolution. If they could not be so completed, then independence would have to be withheld even after dissolution. Furthermore, it was Mr. Butler's view that the secession of one of the three constituent units would not dissolve the Federation.⁶ The latter opinion was expressed to explain to Mr. Field that his request to have independence granted upon the secession of either one of the other two territories (Northern Rhodesia and Nyasaland) was not susceptible of compliance because as the secession of only one of the constituent units could not legally affect Southern Rhodesia's continued membership of the non-independent Federation, independence could not be granted to a member of this non-independent entity. The short answer is that Southern Rhodesia could have terminated its membership by secession either prior to or concurrently with her independence. It was therefore not an answer to Mr. Field's application for the conferment of independence to reply the way Mr. Butler did:⁷

Our legal advice is that it would not in any event be possible to make Southern Rhodesia an independent country in the full sense of

5. CMND. 2000, p. 4; CMND. 2073, p. 4.

6. CMND. 2000, p. 5; CMND. 2073, p. 5.

7. CMND. 2000, p. 4; CMND. 2073, pp. 4-5.

the word while remaining a member of the non-independent Federation. So long as she remains a member of the Federation, so long will the United Kingdom Parliament have power to legislate with regard to the Federation and so indirectly with regard to Southern Rhodesia.

In so far as the excerpt just quoted suggests that the undertaking for which Mr. Field asked could not be given because of a constitutional impediment, the point is fatuous. If Southern Rhodesia could not be granted independence within the Federation, then independence could only be given when she seceded. So unless there was an impediment to her secession (such an impediment would be ill-conceived if the other units enjoyed the right) there was no legal impediment to her being granted independence, and assuming the moral impropriety of elevating her to independence with a minority government, the refusal on this ground would have nothing to do with the opinion embodied in the legal advice adverted to by Mr. Butler. The latter would have been more candid if he had emphasised that the impediment was political.

Mr. Butler dropped a clear hint that the undertaking would not be given when he wrote:⁸

In any case Her Majesty's Government, in accordance with normal precedent, would expect to convene a Conference to discuss financial, defence, constitutional and other matters, which always have to be settled before self-governing dependencies are granted independence.

8. CMND. 2000, p.5; CMND. 2073, p.5.

Mt. Butler's reply, to the extent that it can be treated as an answer, appeared to assert that Southern Rhodesia could only expect independence concurrently with the secession of the first of either of the two units to exercise the right, if the issues relating to her independence could be resolved as expeditiously as those relating either to the independence or secession of the first of the two other units to achieve the stated alternatives. Because the United Kingdom could withhold consent to whatever solutions were proposed for the issues to be discussed, the acceptance or imposition of a Conference would in fact mean that the United Kingdom would be free to delay the independence of Southern Rhodesia and return a negative response to her request for independence at the point of time she favoured. Having thus very indirectly refused to give the undertaking, Mr. Butler explained that as he could not yet agree to Southern Rhodesia's independence on the terms stipulated and as the country was already protected by the convention of not being interfered with on matters within her Legislature's competence, there was no other elevation of status he could offer on behalf of the United Kingdom.⁹ It may be relevant to recall that the Southern Rhodesia Premier had not asked for an intermediate constitutional status for his country. It is therefore confusing for Mr. Butler to say, gratuitously, "we do not see how it¹⁰ can be

9. CMND. 2000, p. 5; CMND. 2073, p. 5.

10. The status at that time of the country.

improved from your point of view pending the granting of full independence."¹¹

(2) SOUTHERN RHODESIA PERSISTS IN ASKING FOR INDEPENDENCE

The Prime Minister of Southern Rhodesia, Mr. Field, when replying to Mr. Butler's reply to his first letter repeated his intention not to attend the Conference for the Dissolution of the Federation unless the undertaking to confer independence on Southern Rhodesia at the requested moment of time was given in writing by Mr. Butler.¹² Mr. Field's letter was dated April 20, 1963 - eleven days after Mr. Butler's reply was given. Mr. Field also made it plain that since the only way of adding to his country's status was the grant of full independence itself (a point conceded by Mr. Butler), it was not possible to envisage what could be meant when Mr. Butler had referred to the normal processes to independence which his country was alleged to be required to undergo. It is suggested that the point made by Mr. Field is valid as a matter of constitutional law.

Though further correspondence was exchanged the positions of both parties remained unchanged, except that in one of his subsequent letters Mr. Field relented on his threat not to attend the Dissolution Conference.¹³ He said

11. CMND. 2000, p. 5; CMND. 2073, p. 5.

12. CMND. 2073, p. 8.

13. CMND. 2073, p. 17.

he was prepared to reconsider his decision. His words were as follows:¹⁴

We feel it is our duty if at all possible to avoid continuing the uncertainty for both the Federal Government and its employees as well as for the people of Southern Rhodesia and therefore we are inclined to reconsider the matter of our attendance at the conference.

Mr. Field then invited Mr. Butler to Salisbury to discuss Southern Rhodesia's independence. It was suggested that the First Secretary should arrive a few days before the Conference at the Victoria Falls.

The invitation was declined thus:¹⁵

You have invited me to meet you in Salisbury on 25th or 26th June. I feel that as Chairman I should travel direct to Victoria Falls without breaking my journey in Salisbury but I would propose to arrive at the Falls on 26th June and would be glad to meet you there if that were convenient to you. You will remember that when we met in London we discussed possible amendments which might be made by your Government to the Southern Rhodesia constitution which would result in broadening the basis of representation in the legislature and would take effect as soon as practicable. We also discussed the future development of policy on non-discrimination. So far as we are concerned these matters remain for further discussion.

14. CMND. 2073, p. 17, para. 6.

15. CMND. 2073, p. 19.

(3) MR. BUTLER'S ALLEGED PROMISE OF INDEPENDENCE

It has been subsequently asserted that on the eve of the Victoria Falls Conference Mr. Butler gave a categorical guarantee to Mr. Field that Southern Rhodesia would receive its independence without difficulty if Mr. Field would consent to attend the conference on the next day. Mr. Kenneth Young in his book¹⁶ favours this account:

Field - and Smith who was present as his deputy and Treasury Minister - claims that a categorical assurance was given him by Mr. Butler that, if he attended the Conference next day, Southern Rhodesia's independence would be 'dealt with immediately and would present no difficulties'. Butler denies this, and is supported by Welensky and the civil servants who, however, were not present at all the talks in bedrooms and sitting rooms.

.....

Field says the assurance was given off the record during a private evening talk, but that he then sought out Smith so that he, too, could hear Butler's words..... He recalls that when they left Butler's room, Smith turned at the door, wagged his finger and said: 'Now Mr. First Secretary of State, don't you go back on your word on this.'

Smith has agreed that this account is correct. But he has gone further and told me:¹⁷ 'Because these chaps were always far too clever to put their promises in writing I am, unfortunately, unable to produce a document which would confirm my allegation. However, it is a fact (as I have said on many occasions and indeed Winston Field concurs) that we were inveigled into going to the Falls Conference on promises of independence made by the British Government and, in particular, a definite promise made by Butler. I am prepared to state quite categorically that

16. Rhodesia and Independence; by Kenneth Young; J.M. Dent and Sons, Ltd.; 1969; first published in 1967 by Eyre and Spottiswoode. The account is given in the 1969 edition on pages 89-90.

17. i.e. Kenneth Young.

I heard him say to Winston Field that if we were prepared to co-operate in the dissolution of the Federation by attending the Falls Conference, he would give an undertaking that as soon as the Conference was successfully concluded the British Government would attend to our wishes for independence and that we would be given our independence at a date not later than the date of granting independence to the other two members of the Federation. I know it is my word against his but at least I do have Winston Field to support me in what I have to say.'

This account has provoked refutation from Lord (as he now is) Butler in his memoirs:¹⁸

Winston Field, who became a friend and whose untimely demission of office and later demise I much regret, for long refused to attend a conference. He wished, as a prior condition, to have a guarantee of the independence of Southern Rhodesia. But the same facts stared me in the face then as confronted the Labour government later: to give independence to an administration unprepared to open multiracial paths to government is contrary both to British tradition and to Commonwealth unity. Field subsequently claimed that I had actually offered him independence before the Victoria Falls Conference opened, and the story is reproduced, with embellishments from Ian Smith, in Kenneth Young's book RHODESIA AND INDEPENDENCE. The story is not accurate. I know perfectly well that I did not give the Southern Rhodesians an assurance of independence, and so does Sir Roy Welensky.¹⁹ On the contrary, I ASKED²⁰ for assurances in terms which the Rhodesian Prime Minister was unable to accept. In the end, and almost literally at the end, Winston Field agreed to come to the conference.

18. The Art of the Possible; Lord Butler; Hamish Hamilton Ltd., 1971; p. 226.

19. Prime Minister of the Federation (i.e. the Central African Federation) at the time.

20. Lord Butler's own emphasis.

No correspondence was exchanged between the British and Southern Rhodesia Governments subsequent to the Victoria Falls Conference until November, 1963.²¹

(4) TALKS IN LONDON: U.D.I. FIRST MENTIONED

In January, 1964, Mr. Field visited London and whilst there, had private and confidential talks with the British Prime Minister, Sir Alex Douglas-Home, and the Commonwealth Secretary, Mr. Duncan Sandys.²² The purpose of Mr. Field's visit was not official negotiation with the British Government on his country's independence.

The threat of a Unilateral Declaration of Independence (U.D.I.) by Southern Rhodesia was first officially mentioned in negotiations between the two sides in a letter (dated February, 22, 1964) from Mr. Sandys to Mr. Field, part of which read:²³

The Press here have been reporting from different sources, that Southern Rhodesia may be contemplating a unilateral declaration of independence. I sincerely hope that these reports are without foundation. For I cannot believe that those who may be thinking like this, have fully weighed the likely consequences.

.....The African Nationalists in Southern Rhodesia would probably set up a Government in exile, which many countries would recognise.

.....

21. So stated in CMND. 2807, p. 5.

22. CMND. 2807, p. 9.

23. CMND. 2807, pp. 11-12.

A unilateral declaration of independence by Southern Rhodesia would not of course, make Southern Rhodesia legally independent. To take such action would be outside the Constitution which Southern Rhodesia Ministers are pledged to work. The British Government would, therefore, be bound to take the view that this had no legal or constitutional validity.

.....

We would be profoundly unhappy to see Southern Rhodesia's long-standing connection with the Sovereign and with Britain impaired let alone severed. But I trust that no decisions in Salisbury will be based on the assumption that it would be possible for The Queen to become the separate Sovereign of an independent Southern Rhodesia outside the Commonwealth. This would inevitably involve the Crown in acute controversy within the Commonwealth.....

I noticed, however, that you stated recently in Salisbury that negotiations with the British Government were still proceeding and that you wished to continue to negotiate..... We entirely share your view.

(5) SOUTHERN RHODESIA HAS A NEW PRIME MINISTER:
MR. I.D. SMITH

The above was the last important communication between Mr. Field and Mr. Sandys because soon Mr. Field would be replaced²⁴ as Prime Minister of Southern Rhodesia by Mr. Ian Smith. Mr. Field was superseded by Mr. Smith who was the first Prime Minister of Southern Rhodesia to have been born there.²⁵ In his first official letter to the British Prime Minister, Sir Alec Douglas-Home, Mr.

24. YOUNG, op.cit.;p. 105.

25. YOUNG, op.cit.;p.108.

Smith expressed his adherence to the posture maintained by his predecessor in regard to independence for his country. He also persisted in the assertion that the 1961 Constitution had won acceptance from the Southern Rhodesia electorate because of the latter's assumption, fostered by his country's government at the time, that the Constitution submitted to them for their approval was to be that which they would retain when independence was granted to them upon the dissolution of the Federation of which their country then formed a part.

Mr. Smith's own words were:²⁶

These proposals²⁷ were admittedly a compromise in the sense that, as always in such negotiations, no section of the community was fully satisfied. Nevertheless, on assurances from Sir Edgar Whitehead, the Prime Minister of the time, that when His Government had negotiated the new Constitution they had done so in the belief that if the Federation were to break up, Southern Rhodesia would have complete independence, it was accepted by a substantial majority of the electorate. If this belief was unfounded, which we now understand is your Government's contention, then it is strange that no formal steps were taken at the time to inform the Government of Southern Rhodesia that the view held by the British Government was in direct conflict.

.....To accept such a Constitution was a momentous step for the electorate of this country to take their acceptance of this compromise places upon the British Government an obligation to grant Southern Rhodesia its independence as a logical sequel to the break-up of the Federation. 28

26. CMND. 2807, p. 15.

27. i.e. proposals for changes in the 1923 Constitution to be embodied in the proposed 1961 Constitution.

28. The letter was written on May 6, 1964.

In his reply, the British Prime Minister contended:²⁹

You claim that there was some understanding between the British Government and the Government of Southern Rhodesia that 'if the Federation were to break up, Southern Rhodesia would have complete independence.' I must make it clear that there is no substance whatsoever in this claim, and that no such assurance was ever at any time asked for by the Government of Southern Rhodesia or given by the British Government.

.....

Towards the end of your letter you ask me to explain why the British Government is unable to grant independence to Southern Rhodesia. I can assure you that we do not base ourselves on the argument that 'times and circumstances have changed'. Our reasons were set out clearly in the message sent by Mr. Sandys to Mr. Field on 7 December.³⁰ In this he said: 'The present difficulty arises from your desire to secure independence on the basis of a franchise which is incomparably more restrictive than that of any other British territory to which independence has hitherto been granted'.

THE DOWNING STREET TALKS BETWEEN THE BRITISH AND SOUTHERN RHODESIA PRIME MINISTERS IN SEPT. 1964³¹

(6) MR. IAN SMITH STATES HIS POSITION

In early September, 1964, Mr. Smith flew to London to hold talks with the British Government on the issue of his country's independence. The first meeting was held on September 7.³² Mr. Smith began by reiterating his

29. CMND. 2807, pp. 15-16.

30. 1963 CMND. 2807, p. 6, at p. 7.

31. CMND. 2807, pp. 21-39.

32. CMND. 2807, p. 21.

claim that Southern Rhodesia should be granted independence forthwith because her people had acquiesced in the 1961 Constitution on the understanding that their country would in exchange receive its independence upon the dissolution of the Federation "without more ado". The British Prime Minister (Sir Alec Douglas-Home) replied that independence could only be granted to the three territorial units if their respective peoples consented to the terms on which their freedom was to be given. Even if there had been, as Mr. Smith alleged, "an implied contract" to grant Southern Rhodesia her independence on the 1961 Constitution - and there never was such a contract - the agreement of her people was a condition that could not be demolished in any circumstances. Mr. Smith responded by stressing that his country had got to have her independence, and that one way of achieving this was by way of a unilateral declaration to that effect.³³ Mr. Smith assured the British Prime Minister that the 1961 Constitution enjoyed the support of the majority of the African population. He held up the "political inexperience" of the "average African" as militating against the suitability of a referendum to ascertain the wishes of the people. He also referred to the pernicious effect of intimidation by Africans on Africans. Mr. Smith made it plain to the British Prime Minister and Commonwealth Secretary (who was also present) that his inclination was

33. CMND. 2807, p. 23.

to have African opinion assessed through "the established tribal system" where the Chiefs and Headmen spoke for an overwhelmingly preponderant part of the African population: three million out of three and a half million (presumably these figures were those obtaining in 1964). The views of Europeans, on the other hand, could be expressed by the electorate, which was predominantly European. Sir Alec Douglas-Home replied with scepticism regarding the reliability of trusting a meeting of Chiefs and Headmen with the task of canvassing African opinion. He countered with the suggestion of a referendum, possibly one conducted by the Chiefs and Headmen. Mr. Smith declined the proposal on the ground that the complications thrown up by the independence issue would be too great a challenge to the comprehension of the rural African. Again, a referendum would insinuate the inadequacy of the Chiefs, leading to a debilitation of the tribal system which Mr. Smith felt essential to have sustained. He informed the British Ministers that the nationalist political parties (which adamantly rejected any form of independence not accompanied by majority rule) had through their tactics of intimidation already eroded the status of the tribal system, an erosion Mr. Smith was determined to halt. The Commonwealth Secretary again affirmed his preference for a referendum, Mr. Smith repeated the unacceptability of a referendum, explaining that although the rural African could claim competence to choose between two candidates in a parliamentary

election, it would be "unrealistic" to expect him "to express any rational view" about the concept of independence which was "vastly more complex and sophisticated".³⁴ (A possible answer to Mr. Smith's distinction, in my opinion, may lie in the fact that in a parliamentary election the choice is NOT between two candidates but between two or more policies of government which cannot always be said to be free from complexities or secure from sophistry.) The Commonwealth Secretary then made the suggestion that the Africans, on the assumption that their comprehension was unequal to the complexity of the independence issue, might at least be allowed to choose representatives by way of adult suffrage to represent them at a conference for the resolution of the difficulties confronting independence. Mr. Smith said that "yet another conference"³⁵ was "out of the question". The idea was repugnant to "local opinion." (Presumably he meant, however incredibly, the opinion of the majority of the population of Southern Rhodesia.)

The discussion was adjourned until the afternoon.

34. CMND. 2807, p. 25.

35. The conference held in 1961 to discuss a new Constitution had throughout the negotiations (up to U.D.I.) been maintained by Mr. Smith (and indeed his predecessor) as the final conference before independence.

(7) DISAGREEMENT PERSISTS OVER THE METHOD OF
ASCERTAINING AFRICAN OPINION

Upon the resumption of the meeting, Sir Alec Douglas-Home repeated his lack of confidence in the ability of a meeting of Chiefs and Headmen to ascertain the views of the African population regarding the issue of independence. He reiterated the greater reliability of the referendum. Mr. Smith again declined to concur in the correctness of this view. Even a referendum controlled by neutral observers did not appeal to Mr. Smith.

Sir Alec Douglas-Home then moved on to admonish Mr. Smith on the consequences of a unilateral declaration of independence, but Mr. Smith riposted that such consequences were less appalling than "the gradual extinction of civilised life in the country".³⁶ Mr. Smith discounted the possibility of an alternative government in exile in the event of U.D.I.

The discussion stood adjourned until the next day.³⁷

Sir Alec Douglas-Home, as he had done the previous afternoon, commenced by expressing dissatisfaction with the indaba of Chiefs and Headmen urged by Mr. Smith. He went on to impress upon the latter that independence under the 1961 Constitution was agreeable to the British Government if it was so desired by the "great majority" of

36. CMND. 2807, p. 29.

37. CMND. 2807, p. 30.

Southern Rhodesia's peoples. Mr. Smith stated that he could not at that moment offer a plan to test African opinion. He envisaged no difficulties in the test of European opinion which he said could be conducted through voting on both 'A' and 'B' rolls.³⁸ The Commonwealth Secretary saw no reason to question the adequacy of the test to ascertain European opinion.

In the course of that discussion Mr. Smith said that he discounted the necessity for a unilateral declaration of independence (U.D.I.).³⁹ The meeting then proceeded to discuss matters which it is not proposed to record here.

On the third day of their meeting (September 9, 1964) the British Prime Minister made it unequivocally understood that even if Mr. Smith could demonstrate to the British Government's satisfaction that the 1961 Constitution was endorsed as an independence constitution by the people of Southern Rhodesia, such an achievement would still not bind the British Government to grant the country its independence. The Commonwealth Secretary - with a better claim to reason - stated that if the Africans favoured the present constitution (i.e. the 1961 Constitution) the British Government could hardly take exception to their choice.

38. The 'A' roll comprised votes with higher qualifications in Terms of education and financial status than those voters who comprise the 'B' roll. The 'A' roll voters could return 50 members of the Legislative Assembly whereas the 'B' roll voters could only elect fifteen members. The total membership of the Assembly was 65.

39. CMND. 2807, p. 32.

It emerged from the discussion that Mr. Smith would revert to his decision to adopt U.D.I. if the British Government was to withhold independence despite being satisfied that the Southern Rhodesia people approved the provisions in the 1961 Constitution.⁴⁰

Without introducing anything new the meeting adjourned until the fourth day. This meeting⁴¹ was brief. Sir Alec Douglas-Home insisted that the joint communiqué should make it clear that the United Kingdom Government reserved her position over the whole field of discussion. The Commonwealth Secretary added that both parties should feel free to announce that they were as yet uncommitted on the best way to ascertain African opinion.

Mr. Smith accepted from Sir Alec a written statement to the effect that the United Kingdom Government did not promise anyone that the 1961 Constitution would see Southern Rhodesia through to its independence if its electorate approved that Constitution.

(8) THE JOINT COMMUNIQUÉ

Part of the joint communiqué issued on September 11, 1964 read:⁴²

The British Prime Minister said that the British Government must be satisfied that any basis on which it was proposed that independence should be granted was acceptable to the people of the country as a whole.

40. CMND. 2807, p. 35.

41. i.e. the meeting on the fourth day, September 10, 1964: CMND. 2807, p. 37.

42. CMND. 2807, p. 39; CMND. 2464, p. 1.

The Prime Minister of Southern Rhodesia accepted that independence must be based on general consent and stated that he was convinced that the majority of the population supported his request for independence on the basis of the present Constitution and franchise. The British Prime Minister took note of this statement but said that the British Government had as yet no evidence that this was the case. The Prime Minister of Southern Rhodesia recognised that the British Government were entitled to be satisfied about this and said that he would consider how best it could be demonstrated so that independence could be granted.

The British Prime Minister said that the British Government would take account of any views which might be freely expressed by the population on the issues involved; but he must make plain that the British Government reserved their position. ⁴³

Mr. Smith returned to Salisbury and proposed to hold, on October 22, 1964, an indaba of Chiefs and Headmen. On October 14, he transmitted to the British Government an invitation to send observers to witness this event. The British Government instructed their High Commissioner in Salisbury to convey the unacceptability of the proposed indaba as an adequate test of African opinion. The reply was made on October 15, and handed to Mr. Smith the next day. (The British General Election on October 15, 1964 returned a new government but the incoming Commonwealth Secretary in a message to Mr. Smith on October 19, confirmed the unacceptability of the proposed indaba. This was held from October 21-26, followed by a referendum participable

⁴³. The underlining is my own.

by the electorate on November 5; both these tests returned affirmative results.

(9) THE UNITED KINGDOM HAS A NEW PRIME MINISTER:
MR. HAROLD WILSON

The new British Prime Minister, Mr. Harold Wilson, expounded the attitude of the new government to Mr. Smith in a letter on December 21, 1964. Part of this message stated:⁴⁴

You ask me to state that my Government is not opposed to granting independence on the basis of the 1961 Constitution; and to deny that we will only grant independence to an African majority Government. We are prepared to grant independence on ANY⁴⁵ basis which we are satisfied is acceptable to the people of the country as a whole. You yourself, as recorded in the communique issued after your talks in London in September, have accepted that the British Government are entitled to be satisfied on this score.

We are only prepared to grant independence on the basis of the present Constitution and franchise if it is demonstrated to our satisfaction that the people of the country as a whole wish for independence on that basis.

Of distinctive importance is the last sentence in the message because it conceded to Mr. Smith what the previous Administration had constantly withheld: namely that the consent of the territory's population should be both a necessary and sufficient condition to the cession of sovereignty to Southern Rhodesia. The previous Administration had stipulated that such consent represented

44. CMND. 2807, p. 49.

45. My own emphasis.

no more than a condition precedent the satisfaction of which would not oblige the United Kingdom Government to grant independence without more, if more should have been required by that government. That this was their attitude is clearly perceptible from the closing sentence in the joint communique of Sir Alec Douglas-Home and Mr. Smith:⁴⁶

The British Prime Minister said that the British Government would take account of any views which might be freely expressed by the population on the issues involved; but he must make it plain that the British Government reserved their position.

In February-March, 1965, the Commonwealth Secretary (Mr. Bottomley) and the Lord Chancellor (Lord Gardiner) visited Salisbury to discuss the issue of independence with the Southern Rhodesia Government. In a letter from the Commonwealth Secretary to Mr. Smith six months later (September, 1965) the former revealed what he had explained to Mr. Smith were the principles regarding independence which the British Government was determined to defend. On the occasion of that visit the Commonwealth Secretary had articulated the following principles as irreducible:⁴⁷

46. CMND. 2464, p. 1.

47. CMND. 2807, p. 66.

- (i) the principle and intention of unimpeded progress to majority rule, already enshrined in the 1961 Constitution, would have to be maintained and guaranteed.
- (ii) There would also have to be guarantees against retrogressive amendment of the Constitution.
- (iii) There would have to be immediate improvement in the political status of the African population.
- (iv) There would have to be progress towards ending racial discrimination.
- (v) The British Government would need to be satisfied that any basis proposed for independence was acceptable to the people of Rhodesia as a whole (on which you had acknowledged our right to be satisfied. 48.

TALKS AT 10, DOWNING STREET, BETWEEN THE BRITISH GOVERNMENT AND THE SOUTHERN RHODESIA GOVERNMENT, BETWEEN 5th AND 11th OCTOBER, 1965 49

(10) MR. SMITH CLAIMS THAT BRITAIN HAD PROMISED ON TWO SEPARATE OCCASIONS TO GRANT SOUTHERN RHODESIA EARLY INDEPENDENCE

The Southern Rhodesia Prime Minister arrived in London on October 4, 1965. Talks between Mr. Wilson and his colleagues on the one hand, and Mr. Smith and his colleagues on the other, began the next day. The discussions on the first two days (5th-6th October) have not been published, but what went on then was recapitulated at

48. After Southern Rhodesia had resorted to U.D.I., the British Government, in 1966, added a sixth principle: "It would be necessary to ensure that, regardless of race, there was no oppression of majority by minority or of minority by majority." (CMND. 3171, p. 3.)

49. CMND. 2807, pp. 69-95.

the meeting on October 7, of which the discussion has been published.

Mr. Smith led the discussion by pointing to his claim that the Southern Rhodesia Government of the time had been induced to attend the Victoria Falls Conference in June 1963 on the pledge received from the British Government that their attendance would secure for their country independence not later than the demise of the Central African Federation. The Southern Rhodesia hopes had been dashed and the situation in their country was such that their government was no longer amenable to further delay being imposed on their wish for full sovereignty.

He proceeded to sustain his case by attracting attention to another promise alleged to have been given by the British Government in 1961 when the latter desired Southern Rhodesia to accept the 1961 Constitution. The promise was that the 1961 Constitution was acceptable to the British Government as an independence constitution when the Federation lapsed.

Mr. Smith made an oblique reference to alleged deception on the part of the British Government relating to a blocking mechanism to protect certain sections of the proposed Independence Constitution. He stated that he was allowed to entertain the belief that the mechanism would relate only to the entrenched (sometimes known as specially entrenched) parts of the proposed Constitution,

whereas the British Government had now decided to tell him that the mechanism as proposed was applicable to all constitutional amendments. This suggestion, Mr. Smith argued, would reduce the country's internal freedom because at the time ordinary amendments could be effected with a two-thirds majority in the Legislative Assembly. (The two-thirds majority in the 1961 Constitution did not have a one-third block of African-elected M.P.s, which blocking third a revised 1961 Constitution was required by the British Government to have.) Mr. Smith expressed his suspicion that the purpose of the blocking third had nothing to do with the British Government's concern for security against easy amendments, but could be identified as a desire to increase African representation in the Legislative Assembly.

Mr. Smith was prepared to envisage the composition of the blocking third as comprising the 15 African 'B' Roll members obtaining under the 1961 Constitution to be combined with a Senate exclusively constituted of 12 Chiefs. The 12 Chiefs together with the 15 members of the Lower House would provide a blocking third when both Houses voted together (27 Africans in a Parliament of 62 members).

Finally, Mr. Smith was prepared to add a million more Africans to the 'B' Roll after independence.⁵⁰

50. CMND. 2807, p. 70.

[The offer to concede a blocking third may seem fair at first sight, but when one realizes that this could only be obtained if all the African elected members agreed to unite, and in addition succeeded in persuading half the Chiefs in the Senate (all of whom owe their chieftaincies to Government appointment, are paid by the Government, and are dismissible by the latter when it considers them unfit) to vote with them. The Chiefs were to lose their seats in the Senate when they ceased to be Chiefs. In short the Senate was unavoidably to be subservient to the Government. But if the number of Senators was to be subtracted from the blocking third, African representation in Parliament would be 15 members out of 62 - a figure inadequate to constitute a blocking third.]

Mr. Smith added a rhetorical flourish to his conclusion by comparing his country's possible need to resort to U.D.I. with Britain's decision to enter the war in September, 1939. The British Ministers did not find it necessary to offer a refutation to the suggested parallel.

The Commonwealth Secretary replied that the United Kingdom Government could not share Mr. Smith's confidence on the proposed Senate. That Government was satisfied that convincing safeguards would be necessary to ensure the unimpeded progress towards majority rule demanded by the first principle. Furthermore, after independence, even ordinary Constitutional amendments would call for greater protection than that offered under the 1961 Constitution.

The Commonwealth Secretary then engaged in the question of racial discrimination. Some "dramatic forward move" was called for to reduce discrimination. Concessions were not forthcoming from Mr. Smith on this point.

(11) WAS APPROVAL BY THE MAJORITY OF SOUTHERN RHODESIANS INSUFFICIENT?

The Prime Minister, Mr. Harold Wilson, then spoke of the need to satisfy public opinion "not only in the House of Commons but also in the rest of the Commonwealth and in many foreign countries, unless they could demonstrate that the final settlement was consistent with the five principles in which they had sought to summarise the basic conditions of Rhodesia independence".

It is suggested that this is an extension of what Mr. Wilson had previously agreed would be sufficient for the granting of independence. Earlier, in a message to Mr. Smith, Mr. Wilson had affirmed:⁵¹

we are prepared to grant independence on any basis which we are satisfied is acceptable to the people of the country as a whole.

It is clear from this that Mr. Wilson had considered acceptability to the people (the fifth principle) as not only a necessary condition to independence but also as one that was of itself sufficient. Mr. Wilson had now noticeably resiled from his position established earlier, by

51. CMND. 2807, p. 49.

demoting a necessary and sufficient condition into an only necessary one. The former sufficient condition was made into one of five conditions, the total fulfilment of which was required before independence would be granted.

(12) THE PROPOSED METHOD OF CONSTITUTIONAL AMENDMENT

The discussion then moved on to the procedure for the amendment of the entrenched sections in the 1961 Constitution, i.e. the second principle (no retrogressive amendment). Mr. Smith said that after independence the method of approving an amendment by motion to the Queen would become defunct. The alternative, the four racial referenda, was cumbersome and inequitable. It was unjust because one per cent of the population (he gave the Asian group as an illustration) could frustrate an amendment favoured by the other ninety-nine per cent. The Senate had been proposed, Mr. Smith explained, to obviate this awkward method. In reply to Mr. Wilson's inquiry on whether the Senate members would be elected, Mr. Smith informed him that they would all be Chiefs.⁵²

In subsequent debate over the amendment procedure, the Commonwealth Secretary sought to clarify the British Government's attitude by stating that the latter intended to retain the racial referenda, and only proposed the blocking third as an extra safeguard to those sections that

52. CMND. 2807, p. 73.

were not entrenched and consequently not protected by the referenda.⁵³

The Prime Minister, Mr. Wilson, was less inflexible than his Commonwealth Secretary. He sympathised with the stricture Mr. Smith passed on the referenda, but suggested that the elimination of the latter was acceptable on the understanding that the members providing the blocking third should themselves be democratically elected. The Prime Minister appeared to imply that there should only be one amendment procedure common to all sections of the constitution whereas his Commonwealth Secretary who preceded him, and his Lord Chancellor who spoke immediately after him, both asserted the distinction between ordinary and entrenched sections in relation to the respective methods of their amendments. Lord Gardiner, the Lord Chancellor, suggested that for ordinary amendments a blocking third of 26 'B' Roll seats ought to be offered by Mr. Smith. By implication the Lord Chancellor supported his colleague the Commonwealth Secretary in preferring the retention of the referenda where entrenched sections were concerned.

(13) THE IMPROVEMENT IN THE POLITICAL STATUS OF THE AFRICANS

Mr. Wilson then piloted the meeting to consider the third principle, which demanded an immediate improvement in

53. CMND. 2807, p. 74.

the political status of the Africans. Mr. Smith replied that he was prepared in satisfaction of this condition to put an additional one million African voters on the 'B' Roll. Mr. Wilson rejoined that this would not give them any extra seats in the Legislature, to which Mr. Smith said that in marginal 'A' Roll seats such Africans would be able to exercise through cross-voting a maximum influence of 25 per cent.

(14) THE ELIMINATION OF RACIAL DISCRIMINATION

The fourth principle was then examined, which called for the progressive elimination of racial discrimination. Mr. Smith pointed out that the Land Apportionment Act was there to protect the Africans from European exploitation. The Commonwealth Secretary reminded him that the Land Apportionment Act had been criticised by the Constitutional Council, and adjured Mr. Smith to admit publicly that, in principle at least, the repeal of that Act was desirable.⁵⁴

(15) HOW WAS AFRICAN OPINION TO BE ASCERTAINED?

Debate was then transferred to the fifth principle, stipulating for acceptability by the people of the territory of any constitution that was proposed as the basis of independence. Mr. Wilson commenced by reiterating the unreliability of the indaba as a test of African opinion. Mr.

54. CMND. 2807, p. 76.

Smith countered by asking Mr. Wilson to propose an alternative. Mr. Wilson confessed that he found it difficult to understand why, if the referenda were suitable for the amendment of entrenched provisions in the 1961 Constitution, the same procedure could not be contemplated in relation to the ascertainment of the wishes of the people as regards the acceptability to them of the Constitution as a whole.

Mr. Smith repeated that this process enabled one per cent of the population to frustrate changes. Mr. Harper, the Southern Rhodesia Minister of Internal Affairs, asserted that the very fact that under the Constitution an alternative to the referenda was provided was an indictment of the latter's workability.

The meeting was adjourned until the next day. After a recapitulation of their respective positions, Mr. Smith made the extraordinary suggestion that the two sides might now discuss the implementation of U.D.I. so that the Southern Rhodesia Government could "place themselves in the most favourable possible position to counter it."⁵⁵ The extent of their action would depend on the extent of the action taken by the United Kingdom Government".⁵⁶ Mr. Wilson dismissed the suggestion that illegal action was suitable for discussion. Nothing new was said in further

55. "it" referred to the action that would be taken by the United Kingdom in the event of U.D.I.

56. CMND. 2807, p. 87.

negotiation. Part of the joint communiqué for this series of meetings read:⁵⁷

The British Ministers have described the Constitutional principles which the British Government would regard as the essential basis on which they could recommend to Parliament the grant of sovereign independence to Rhodesia; and the Rhodesian Ministers have indicated the reasons for which they feel unable to accept those principles in the measure required by the British Government. Despite intensive discussion, no means have been found of reconciling the opposing views.⁵⁸

Further correspondence between Mr. Wilson and Mr. Smith after the latter's return to Salisbury resulted in the arrival in that city of Mr. Wilson on October 25, 1965. The next day discussions between the two sides began in earnest.

MEETINGS IN SALISBURY BETWEEN THE BRITISH AND SOUTHERN RHODESIA GOVERNMENTS ON OCTOBER 26th AND 29th, 1965 59

(16) THE PRELUDE TO U.D.I. - UNILATERAL DECLARATION OF INDEPENDENCE

Mr. Smith led the discussion (on October 26) by informing the British Ministers that he was not averse to the idea of a Treaty between the two countries provided this guaranteed nothing more than the entrenched sections in the 1961 Constitution. The guarantee should not extend beyond the protection given to the entrenched sections. In short, the Treaty should be treated as being confined to

57. CMND. 2807, p. 90.

58. The underlining is my own.

59. CMND. 2807, pp. 102-132.

meeting the second principle of the British Government of preventing retrogressive amendment. He strongly reiterated that the sections in the Constitution that were not entrenched could not be considered for this protection nor for security beyond the present requirement for a two-thirds majority in the Legislative Assembly to effect their amendment.

Mr. Wilson complained⁶⁰ that the restriction of the scope of the Treaty to the entrenched sections would mean that the number of 'B' Roll seats would not be safeguarded and would be exposed to the danger of being reduced to only one seat by the Southern Rhodesia Government. Thus the Treaty as envisaged by Mr. Smith could not even wholly satisfy the requirement against retrogressive amendment.

Mr. Smith's retort to this point is expressed in these words in the records:⁶¹

Mr. Smith said that the power to take this action was already vested in the Rhodesian Government under the 1961 Constitution; and they could not contemplate their existing powers being reduced They could only delay progress to majority rule by this means, because the Constitution ensured that the African majority would eventually prevail on the 'A' Roll. It was impossible to say how long this would take.
 The Rhodesian Government must therefore retain their powers in this field, since, if it appeared at a future election that an African Government was probable and the Rhodesian Government felt, in the light of developments in the countries

60. CMND. 2807, p. 105.

61. CMND. 2807, p. 105.

to the north of Rhodesia, that this would still be premature⁶², they must have the power to delay such a majority by, for example a reduction in the 'B' Roll seats. In the last resort, this would be their only means of preserving their civilisation.

In the course of the discussion, Mr. Smith further suggested that as Africans took over the 'A' Roll seats the number of 'B' Roll seats ought to be proportionately reduced. He said that the division of the electorate into two Rolls was an artificial arrangement to bring Africans to the voting rolls, and that once they began gathering influence on the 'A' Roll, the artificiality of the two Roll system should be gradually eliminated.

Mr. Wilson criticised the suggestion as hostile to African representation. The measure, he insisted, was inimical to African enfranchisement in that although it would not reduce the actual number of Africans in the Legislative Assembly, it would give the Africans fewer members than they would otherwise have been entitled to.

(17) IRRESOLVABLE DISAGREEMENT OVER THE ASCERTAINMENT OF MAJORITY OPINION

The discussion then took place on the fifth principle (the principle of acceptability). Mr. Smith ventured the opinion that compliance with this condition

62. The underlining is my own: the opinion held by Mr. Smith blatantly insinuates that the Southern Rhodesian Government must be endowed with the power to reverse the will of the country's electorate. The Government of Southern Rhodesia was thus demanding insurance, in the case of an imminent electoral defeat, that would enable them to maintain themselves in office by the simple expedient of reducing the number of 'B' Roll seats which total fifteen in a Legislative Assembly of sixty-five seats.

might take the form of consulting the principal African Nationalist leaders, the Africans on the Constitutional Council, those Africans in the Parliamentary Opposition, and the Chiefs and Europeans. Mr. Smith suggested that the opinions of the last two groups could be taken for granted.

Mr. Wilson favoured this idea as a possibility. Mr. Smith invited Mr. Wilson to obtain the views of the leaders of the African Nationalists on the proposals made by the Southern Rhodesia Government (which were basically that the Constitution of 1961 should in most respects be retained).

Throughout the course of this meeting Mr. Wilson expressed his anxiety regarding the security of those sections of the Constitution that were not entrenched. The second principle threw up many difficulties. First, the two sides could not agree on what was the manner in which the entrenched sections were to be protected after independence. Second, the two governments could not agree on whether or not the non-entrenched sections were to have security additional to the two-thirds majority in the Legislative Assembly that was already required to change them.

The next meeting was on October 29th, 1965.⁶³
The long interval was to enable Mr. Wilson to consult

63. CMND. 2807, p. 111.

extra-governmental opinion in Southern Rhodesia. Mr. Wilson reported that the leaders of the African Nationalists were united in their opposition to the granting of independence before majority rule. He said he had impressed upon these leaders two important facts. First, he stressed to them that they could not expect British military intervention in the event of a unilateral declaration of independence. Second, they could not count on majority rule in the immediate future, nor was it possible to have them apprised of what precise period would elapse before such rule could materialise because the intervening period would to a large extent be dependent on African co-operation in multi-racial constitutional arrangements.

Mr. Wilson then proposed to Mr. Smith that the two Governments should work out constitutional arrangements based on a modified 1961 Constitution, and that these arrangements should then, in compliance with the principle of acceptability, be submitted to a referendum comprising preferably all adult taxpayers in the territory. Mr. Wilson suggested that a Royal Commission (with a Southern Rhodesia Chairman and Majority) should be asked to suggest arrangements for the concurrence of the two Governments, and for subsequent submission to the proposed referendum. In pursuance of its task, the Commission would be entitled to canvass opinion in the country as well as take formal^{evidence.} He said that the Commission should not take more than two months to finish its work, and that therefore its creation

would not entail the unnecessary delay which he understood the Southern Rhodesia Government as anxious to avoid.

Mr. Smith replied by casting doubt on the ability of the proposed Commission to formulate a solution acceptable to both Governments.

Mr. Wilson again warned Mr. Smith of the dire repercussions of economic war in the event of U.D.I. when the latter, in response to his proposals, remained persuaded of the view that U.D.I. was still the best solution.⁶⁴

At the conclusion of the meeting (the morning session) the two parties gave their tentative approval to the following formulation of the terms of reference for the proposed Royal Commission:⁶⁵

To recommend such amendments to the 1961 Rhodesia Constitution as will provide the basis on which Rhodesia may proceed to independence as rapidly as possible in a manner which will give effect to the principles enunciated by the British Government in their statement of 9th October 1965, and will be acceptable to the people of Rhodesia as a whole.

In short, the Royal Commission should only submit such suggestions as would not only satisfy the two Governments but also the people of Southern Rhodesia as a whole. It is proposed to inquire into what the phrase "people as a whole" means in relation to the territory. Does it mean

64. CMND. 2807, p. 113.

65. CMND. 2807, p. 116.

the majority or even the overwhelming majority of the people irrespective of race? Or does it signify the SEPARATE consent of the constituent races? The 1961 Constitution would seem to imply that the latter is the case in view of its provision for the four racial referenda. Mr. Smith, though he did not say so explicitly, appeared to reject both alternatives. The racial referenda were anathema because he alleged they were cumbersome. So to him consent of the people could not have meant consent - unanimous consent - of the different races comprising the territory's population. But the alternative, which is the majority opinion of the people irrespective of race, was similarly taboo to him. It would have been more honest of him to have publicly declared that because it was the opinion of the Europeans that they were the collective trustees of civilisation, it was imperative that they, and they alone, should decide the fate of the country. Such an attitude, irrespective of its moral merits, would at least have spared Mr. Smith and his Government from having to contrive a meaning for the phrase "majority of the people as a whole" that signified neither the opinion of the majority irrespective of race, nor the unanimous concurrence of the different constituent races of the territory (unanimity being taken in the sense that all the different races demonstrate by majorities that they favour a certain arrangement). My interpretation of the phrase is that "the majority opinion of the people as a whole" must mean the separately ascertained consent of all the constituent races. This is especially so where

"the people" is qualified by the phrase "as a whole". Had the phrase simply been "the majority of the people" this would have meant that one race with an absolute majority would have been able to dictate to the other constituent races.

Between the session in the morning (which continued into the evening) and that at night, the Chief Justice of Southern Rhodesia gave Mr. Wilson a piece of paper containing Mr. Smith's proposals for a modified 1961 Constitution. The proposals were succinct and read as follows:⁶⁶

1. Independence on the 1961 Constitution.

Creation of House of Chiefs of 12.

2. Two-thirds majority of House of Chiefs voting with our Parliament have full power to alter any entrenched clauses.

3. Commission: Sir Hugh Beadle: Chairman.

1. U.K. Choice.

1. Rhodesia choice.

Mr. Wilson to sign that he will grant independence if Commission finds that this is acceptable to the people of Rhodesia as a whole.

Mr. Wilson did not immediately display his response.

The meeting, broken off in the afternoon (October 29, 1965), resumed at 9.10 p.m.⁶⁷ It was destined to be the last formal discussion between Mr. Wilson and Mr. Smith before U.D.I. Mr. Smith commenced (and what he said was

66. CMND. 2807, p. 116.

67. CMND. 2807, p. 117.

clarified by Mr. Harper⁶⁸) by stating that he wished to restrict the function of the Commission to the assessment of the opinion of the people as a whole. He could not agree with Mr. Wilson that the Commission should be given the duty of devising a solution acceptable to both sides as well as to the people. He said it would be better for the two Governments to agree on an arrangement and ask the Commission to test its acceptability to the people. It emerged from the discussion that Mr. Wilson was not averse to this suggestion although he said it would be better for the Commission to submit an interim report regarding the method or methods which it was proposing for the ascertainment of Southern Rhodesia opinion. Mr. Wilson further made it clear that he had not jettisoned his proposal that the Commission should have wider duties. Both leaders agreed (although Mr. Smith was subsequently to deny this) that the report of the Commission would have to be unanimous to command conviction.⁶⁹

The point of intractability surfaced when it came to the formulation of a solution acceptable to both governments. Mr. Lardner-Burke (Southern Rhodesia Minister of Justice and of Law and Order) gave it as his view that to envisage agreement by the two sides on an arrangement was "wholly unrealistic".⁷⁰ Mr. Smith reiterated that the

68. Southern Rhodesia Minister of Internal Affairs and also of the Public Service.

69. CMND. 2807, p. 121.

70. CMND. 2807, p. 121.

position of his government remained as it was during his discussions in London earlier on in the year. Mr. Wilson rejoined by affirming his adherence to the five British principles.

In the course of further discussion Mr. Wilson promised to seek the views of his Cabinet in London regarding the narrow function which the Southern Rhodesia government suggested the proposed Royal Commission should have.⁷¹

Upon the two sides agreeing to the Commonwealth Secretary and the British Attorney-General remaining in the country to resolve, or at least identify, the difficulties and differences between the two parties, the meeting adjourned. The two British Ministers remained for another two days of discussions before a joint memorandum⁷² was presented to the two governments on the positions established by these subsequent discussions.

As regards ordinary constitutional amendments the Southern Rhodesia Government were adamant that no additional safeguard ought to be given to what was already stipulated in the 1961 Constitution, i.e. a two-thirds majority of the total membership of the Legislative Assembly. The British demand of a "blocking third" was found unacceptable.

71. CMND. 2807, p. 129.

72. CMND. 2807, p. 132.

On the question of the entrenched sections the Southern Rhodesia government was prepared to concede a "blocking third" provided that this did not mean the addition of any more directly elected Africans for the purpose. They suggested a House of 12 Chiefs. The British Ministers were unable to find in the House of Chiefs that degree of assurance which, if that proposal was to replace the racial referenda, that House was required to offer. The British Ministers countered with the suggestion that a more reassuring substitute for the racial referenda would be a referendum of all adult taxpayers. They had an alternative to this, which was that an amendment to an entrenched section could only be effected by a three-quarters majority, with the 'B' Roll seats augmented to a "blocking quarter". A fixed time should then elapse before the Bill became law. This was to allow the validity of the Bill to be challenged on either of two grounds: (a) that the Bill discriminated or had the effect of discriminating unjustly between the races; (b) that it failed to pay proper respect to the rights and freedoms of the individual. The issue would be adjudicated on by the High Court, and the parties would have the right to appeal to the Privy Council. The Southern Rhodesia Ministers said they were willing to consider the alternative proposal of the "blocking quarter" subject to two riders. First, the blocking quarter was to be created by the addition of two Chiefs to the fifteen 'B' Roll seats. Second, the grounds of appeal should be confined to unjust discrimination between the races.

The Southern Rhodesia Government expressed themselves determined that the scope of entrenchment should not extend beyond its present compass of sections. They would, as a concession, be prepared to entrench the 'B' Roll seats provided the latter could be reduced proportionately to the loss of 'A' Roll seats to non-Europeans. The British Ministers wanted the unconditional entrenchment of the 'A' and 'B' Roll seats. The British Ministers thought that a better idea was to abolish one 'B' Roll seat only after two 'A' Roll seats had been won by non-Europeans. However, the proposal would create difficulties in the event of subsequent electoral reverses.

Surprisingly, the British Ministers were amenable to the Southern Rhodesia Government's proposal for the extension of the 'B' Roll franchise to "qualified indigenous adult taxpayers" provided the qualification was acceptable to the British Government. I express astonishment because the increase in the 'B' Roll franchise would not of itself give the Africans any more seats.

In subsequent correspondence, Mr. Smith denied that he had given his agreement to the report of the Commission having to be unanimous.⁷³ It was obvious that the British Government could not accede to a majority report in view of the Southern Rhodesia majority in the Commission's composition.

73. CMND. 2807, p. 139.

On the eve of U.D.I. (November 10, 1965) Mr. Wilson, in a message to Mr. Smith, put this question to the latter, which was never answered:⁷⁴

If the United Kingdom Government undertook to commend to Parliament - whose sovereign rights must be reserved - a unanimous report by the Royal Commission to the effect that the 1961 constitution was acceptable to the people of Rhodesia as a whole as a basis for independence, would the Rhodesian Government give a corresponding undertaking that if the Royal Commission submitted a unanimous⁷⁵ report to the effect that the 1961 Constitution was not acceptable to the people of Rhodesia as a whole as a basis for independence they would abandon their claim in this respect and would agree that a Royal Commission should then proceed to devise a new constitution for Rhodesia which would give effect to the principles enunciated by the United Kingdom Government in their statement of 9 October, 1965⁷⁶, and would be acceptable to the people of Rhodesia as a whole as a basis for independence?

(18) U.D.I. PROCLAIMED

On the morning of November 11, 1965, Southern Rhodesia or, strictly, those who purported to speak on her behalf, proclaimed U.D.I. This was how the Proclamation resounded:⁷⁷

74. CMND. 2807, p. 143.

75. Mr. Wilson appeared to assume that the alternative conclusions he envisaged for the Royal Commission would be unanimous. He failed to tell Mr. Smith what was to happen if the Commission's conclusion was unacceptable because it was not unanimously arrived at.

76. i.e. the famous five principles.

77. Young, op.cit., p. 286.

Whereas in the course of human affairs history has shown that it may become necessary for a people to resolve the political affiliations which have connected them with another people and to assume amongst other nations the separate and equal status to which they are entitled Therefore, We The Government of Rhodesia, in humble submission to Almighty God who controls the destinies of nations, conscious that the people of Rhodesia have always shown unswerving loyalty and devotion to Her Majesty the Queen and earnestly praying that we and the people of Rhodesia will not be hindered in our determination to continue exercising our undoubted right to demonstrate the same loyalty and devotion, and seeking to promote the common good so that the dignity and freedom of all men may be assured, Do, By This Proclamation, adopt, enact and give to the people of Rhodesia the Constitution⁷⁸ annexed hereto.

God Save The Queen.

(19) WHY DID THE SERIES OF NEGOTIATIONS RESULT IN U.D.I.?

It is important to note that although the arguments were protracted in time they were simple in substance. The manoeuvres of the United Kingdom Government pointed to their invincible reluctance to grant independence before they could be satisfied of the definite prospect of eventual African majority rule, i.e. rule by the majority of the people of Southern Rhodesia, in Southern Rhodesia. It is pertinent to stress that the United Kingdom did not insist on independence being given only when there is majority rule. On the other hand, the Government of Southern Rhodesia, which was in the hands of a minority race in the population, did not conceal that their endeavours

78. i.e. the "1965" Constitution.

were to ensure that majority rule was to be deferred indefinitely. Their claim was that the majority should not be allowed to govern because they were not yet competent successfully to undertake so important and responsible a task as the government of the country.

The conflict was thus essentially one of political philosophies. The United Kingdom believed in the justice of majority rule, even if this was to be achieved progressively only, and not immediately. The Southern Rhodesia Government wished to carry on entrusting the Government of the country to members of the European community. The exclusion of Africans from effective political power was not ostensibly on grounds of colour, but the qualifications for voting which the Southern Rhodesia Government were prepared to contemplate and, even more restrictively, to practise, were such as would inevitably bring about this result.

When the Southern Rhodesia Government found that the views of the two Governments were irreconcilable, they sought to satisfy their aspiration of perpetuating European control in the country by a Unilateral Declaration of Independence, thus precipitating a constitutional breakdown, as yet unresolved, perhaps unresolvable, of worldwide political significance and - what is more relevant for the purposes of this study of considerable legal

interest.⁷⁹

The constitutional response of the United Kingdom, in conjunction with the other legal aspects of the Unilateral Declaration of Independence, will be the subject of the two Chapters immediately following.

79. The Ministers of the Southern Rhodesia Government who made the incontestably illegal Declaration were, of course, dismissed by the Governor on the Instructions of the Queen. This course was the obvious immediate response of the lawful authorities who had to forestall a possible, spurious claim of United Kingdom condonation by those supporting the rebellion. The rebelling Cabinet, however, ignored their dismissal by the Governor, and purported to carry on under the "1965" Constitution.

CHAPTER 7THE JUDICIAL RESPONSE

We left Southern Rhodesia in the last Chapter with the Unilateral Declaration of Independence. Because the 1961 Constitution which, until that Declaration, was in effective operation governing the affairs of Southern Rhodesia, had not made provision for independence to be assumed in such a manner, the question agitated by this event was whether the new form of government was valid in law. In the nature of things, the United Kingdom maintained that such a unilateral severance was constitutionally nugatory.¹ With a predictably equal determination the new government in Southern Rhodesia (which chose to call the country "Rhodesia") had claimed independence in terms of their "1965 Constitution"².

(i) REACTIONS TO U.D.I.

On November 16, 1965, the United Kingdom passed the Southern Rhodesia Act, 1965. It began with a declaration of Southern Rhodesia's status. S.1 provides:³

It is hereby declared that Southern Rhodesia continues to be part of Her Majesty's dominions, and that the Government and Parliament of the United Kingdom have responsibility and jurisdiction as heretofore for and in respect of it.

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1. It passed the Southern Rhodesia Act, 1965: 1965 Chapter 76. Under the authority of this Act the Southern Rhodesia Constitution Order, 1965 was enacted: 1965 S.1 1952.
 2. This Constitution was proclaimed on the date of U.D.I. and "ratified and confirmed" by the "Parliament of Rhodesia" in 1966 in The Constitution (Ratification) Act.
 3. S.1, Southern Rhodesia Act, 1965.

The Act then empowered the Queen-in-Council to do various things in relation to Southern Rhodesia. This was done in S.2, which provides:⁴

2.-(1) Her Majesty may by Order in Council make such provision in relation to Southern Rhodesia, or persons or things in any way belonging to or connected with Southern Rhodesia, as appears to Her to be necessary or expedient in consequence of any unconstitutional action taken therein.

(2) Without prejudice to the generality of subsection (1) of this section an Order in Council thereunder may make such provision -

- (a) for suspending, amending, revoking or adding to any of the provisions of the Constitution of Southern Rhodesia 1961;
- (b) for modifying, extending or suspending the operation of any enactment or instrument in relation to Southern Rhodesia, or persons or things in any way belonging to or connected with Southern Rhodesia;
- (c) for imposing prohibitions, restrictions or obligations in respect of transactions relating to Southern Rhodesia or any such persons or things,

as appears to Her Majesty to be necessary or expedient as aforesaid; and any provision made by or under such an Order may apply to things done or omitted outside as well as within the United Kingdom or other country or territory to which the Order extends.

(3) An Order in Council under this section may make or authorise the making of such incidental supplemental and consequential provisions as appear to Her Majesty to be expedient for the purposes of the Order, and any provision made by or under such an Order may be made to have effect from any date not earlier than 11th November 1965.

4. S.2., Southern Rhodesia Act, 1965. (Only four out of five of its subsections will be reproduced here.)

(4) An Order in Council under this section may be revoked or varied by a subsequent Order in Council thereunder.

Under the authority of the Act the Southern Rhodesia Constitution Order (1965)⁵ was made. S.2. declares the invalidity of any constitution other than such as may be authorised by a United Kingdom Act of Parliament. It reads:⁶

2.-(1) It is hereby declared for the avoidance of doubt that any instrument made or other act done in purported promulgation of any Constitution for Southern Rhodesia except as authorised by Act of Parliament is void and of no effect.

(2) This section shall come into operation forthwith and shall then be deemed to have had effect from 11th November 1965.

The Order then went on to deprive the Legislature of Southern Rhodesia⁷ of all authority and vested legislative authority in the Queen-in-Council. This was effected by S.3. which prescribed:

3.-(1) So long as this section is in operation -

(a) no laws may be made by the Legislature of Southern Rhodesia, no business may be transacted by the Legislative Assembly and no steps may be taken by any person or authority for the purposes of or otherwise in relation to the constitution or reconstitution of the Legislative Assembly or the election of any person to be a member thereof; and Chapters II and III of the Constitution shall have effect subject to the

5. 1965 S.1. 1952. (Made on November 16, 1965.)

6. S.2., 1965. S.1. 1952.

7. i.e. the Legislature under the 1961 Constitution. It should be noticed that the Judiciary in Southern Rhodesia remained unaffected by the Act and Order.

foregoing provisions of this paragraph;

- (b) a Secretary of State may, by order in writing under his hand, at any time prorogue the Legislative Assembly; and
 - (c) Her Majesty in Council may make laws for the peace, order and good government of Southern Rhodesia, including laws having extra-territorial operation.
- (2) Orders in Council made under subsection (1)(c) of this section may confer powers (including the power to make laws) and impose duties upon persons and authorities as well outside as within Southern Rhodesia.

(3) References in the Constitution⁸ or in any other law in force in Southern Rhodesia to a law of the Legislature of Southern Rhodesia or to an Act of that Legislature shall be construed as including references to an Order in Council made under subsection (1)(c) of this section.

(4) Orders in Council made under subsection (1)(c) of this section shall, for the purposes of the Statutory Instruments Act 1946, be statutory instruments within the meaning of that Act and shall be laid before Parliament after being made.

(5) This section shall come into operation forthwith and shall then be deemed to have had effect from 11th November 1965.

The Order further deprived the rebelling Southern Rhodesia Ministers of their executive authority (i.e. the right to advise the Governor, etc.), and vested it in a Secretary of State of the United Kingdom. It proceeded to do this by S.4, which prescribed:⁹

- 4.-(1) So long as this section is in operation -
- (a) the executive authority of Southern Rhodesia may be exercised on Her Majesty's behalf by a Secretary of State;

8. i.e. the 1961 Constitution.

9. S.4, 1965. S.1. 1952.

- (b) sections 43, 44, 45 and 46¹⁰ of the Constitution shall not have effect;
 - (c) subject to the provisions of any Order in Council made under section 3(1)(c) of this Order and to any instructions that may be given to the Governor by Her Majesty through a Secretary of State, the Governor shall act in his discretion in the exercise of any function which, if this Order had not been made, he would be required by the Constitution to exercise in accordance with the advice of the Governor's Council or any Minister;
 - (d) a Secretary of State may exercise any function that is vested by the Constitution or any other law in force in Southern Rhodesia in a Minister or a Deputy Minister or a Parliamentary Secretary; and
 - (e) without prejudice to any other provision of this Order, a Secretary of State may exercise any function that is vested by the Constitution or any other law in force in Southern Rhodesia in any officer or authority of the Government of Southern Rhodesia (not being a court of law) or (whether or not he exercises that function himself) prohibit or restrict the exercise of that function by that officer or authority.
- (2) Where, in pursuance of subsection (1)(d) or subsection (1)(e) of this section, a Secretary of State exercises any function that is vested by the Constitution or any other law in force in Southern Rhodesia in a Minister, a Deputy Minister, a Parliamentary Secretary or any other officer or authority of the Government of Southern Rhodesia, he shall be exempt from any requirement imposed on that Minister, Deputy Minister, Parliamentary Secretary or other officer or authority to consult with, or to seek or act in accordance with the advice of, any other person or authority.
- (3) Notwithstanding the provisions of any other law, any function that is vested by this section in a Secretary of State may be exercised by him by order in writing under his hand or in such other manner as he considers appropriate.

(4) References in this section to an officer of the Government of Southern Rhodesia shall be construed as including references to the Governor.

This was the LEGAL response of the United Kingdom Government. The latter, however, notwithstanding the fierce austerity of its language, failed to enforce the assertions in the Act and Order. It will be explained by the present writer in a later Chapter how there cannot be validity without efficacy. Therefore it is submitted that the Act and Order were not valid.

The Governor of Southern Rhodesia under the 1961 Constitution was instructed by the Queen to dismiss the rebelling government. The message the Governor issued in response to his Instructions read thus:¹¹

The Government have made an unconstitutional declaration of independence.

I have received the following message from Her Majesty's Secretary of State for Commonwealth Relations:

'I have it in command from Her Majesty to inform you that it is Her Majesty's pleasure that, in the event of an unconstitutional declaration of independence, Mr. Ian Smith and the other persons holding office as Ministers of the Government of Southern Rhodesia or as deputy Ministers cease to hold office. I am commanded by Her Majesty to instruct you in that event to convey Her Majesty's pleasure in this matter to Mr. Smith and otherwise to publish it in such manner as you may deem fit.'

In accordance with these instructions I have informed Mr. Smith and his colleagues that they no longer hold office. I call on the citizens of Rhodesia to refrain from all acts which further the objectives of the illegal

11. The message was reproduced in Lord Reid's judgment in Modzimbamuto v. Lardner-Burke: [1968] 3 All E.R. 561, at p. 567. The message was issued on the day of U.D.I.

authorities. Subject to that, it is the duty of all citizens to maintain law and order in the country and to carry on with their normal tasks. This applies equally to the judiciary, the armed services, the police, and the public service.

The message of the Governor was, however, ignored by the rebelling government of Southern Rhodesia. The territory's abiogenetic parturition occurred with the Declaration of Independence reinforced with the new Constitution, the "1965" Constitution. This "Constitution", proclaimed at the date of U.D.I., was "ratified" by the "Parliament of Rhodesia" in what expressed itself to be the Constitution (Ratification) Act, 1966. The "1965" Constitution was set out in the Schedule to the 1966 Act. The new Constitution proceeded to declare the annulment of the 1961 Constitution and its own succession as the apex of authority in Southern Rhodesia. (Both the 1966 Act and the Constitution ratified therewith referred to the territory as "Rhodesia" - deleting the word "Southern" which was embodied in the 1961 Constitution.) S.2 of the new Constitution read:

(1) The Constitution of Southern Rhodesia, 1961, granted to Rhodesia on the 6th December, 1961, under the Southern Rhodesia (Constitution) Order in Council, 1961, and the provisions of the said Order (hereinafter referred to as the old Constitution) are hereby declared to be of no force or effect in Rhodesia immediately before the appointed day and shall at such time be deemed to be repealed and revoked by this Constitution and no longer operative in and for Rhodesia.

(2) The new Constitution as set forth herein (hereinafter referred to as this Constitution) shall come into operation immediately on the expiration of the day preceding the appointed day and shall thereafter in Rhodesia have the full force and effect of law.

(3) For the purposes of this Constitution the 'appointed day' means the day on which this Constitution is published in the Gazette. 12

A novel feature introduced by the new Constitution is that "Parliament" is not synonymous with "Legislature" in Southern Rhodesia.¹³ S.12 defined the Legislature thus:

The Legislature of Rhodesia shall consist of the Officer Administering the Government¹⁴ as the representative of Her Majesty's and a Parliament.

The legislative body in Southern Rhodesia was thus, under the 1965 Constitution, the Legislature, and not the Parliament, of Rhodesia.

Both the United Kingdom and Southern Rhodesia had thus asserted their diametrically opposed views of the legal position consequent on U.D.I. Who was to resolve this monumental confrontation? Inevitably the laws of the new government would be impugned on the grounds of their

12. i.e. November 11, 1965, the date of U.D.I.

13. In view of the present dispute over the status of Southern Rhodesia, the terms "Rhodesia" and "Southern Rhodesia" will be used interchangeably throughout this thesis.

14. The new constitutional Head of State in the country, although formally he purported to represent the Queen.

alleged illegitimacy. Such a challenge would elevate the issue to the very constitutional status of the new, usurping government itself. And where else would laws be impugned but before the courts of the realm? The expected constitutional apocalypse emerged from the case of Modzimbamuto v. Lardner-Burke.¹⁵

(ii) THE LITIGATION IN THE GENERAL DIVISION OF
THE HIGH COURT OF SOUTHERN RHODESIA

On November 5, 1965 (U.D.I. was on the 11th), the Governor, on the advice of his Ministers, had issued a Proclamation of a State of Emergency. Regulations were promulgated under it in pursuance of the powers contained in S.3 of the Emergency Powers Act¹⁶ (Southern Rhodesia). The period of Emergency was to expire after three months unless before then a fresh Proclamation was made. When the

15. This juristically enriching case was litigated first in the General Division of the High Court of Southern Rhodesia - 1966 R.L.R. 756; then in the Appellate Division of the High Court - 1968 (2) S.A. 284, 457 and finally before the Judicial Committee of the Privy Council - [1969] 1 A.C. 645. Because there was a second applicant besides Mrs. Madzimbamuto, the case is also cited as Baron v. Ayre in the Rhodesia High Court, although not in the Privy Council judgment because Baron did not appeal to that tribunal.

16. Chapter 33, Southern Rhodesia.

expiry date arrived in February the country had already undergone the constitutional climacteric of the Unilateral Declaration of Independence. Under the provisions of the document asserting itself to be the "1965 Constitution" the office of Governor was abolished, and was superseded by that of the Officer Administering the Government who, among other things, was empowered, as the Governor had once been authorised, to publish a Proclamation of Emergency. Such a Proclamation was in fact made in February¹⁷ by the said Officer who in May¹⁸ issued another Proclamation to extend yet again the period of Emergency. The first applicant's husband (Daniel Madzimbamuto) was, previously to U.D.I., legally detained, as was the second applicant (Baron).¹⁹ Their detentions were purportedly renewed under powers exercisable after the purported Proclamations of Emergency in February and May, 1966. The applicants challenged the authority of the Officer Administering the Government to issue such Proclamations, thus inevitably impugning the validity of the

17. February 4, 1966.

18. May 3, 1966.

19. Since this case substantively concerns the legality of the "1965" Constitution and since both applicants contested the latter's validity, references to the first applicant should, unless otherwise stated, be taken to include the second applicant. The second applicant, however, did not take his case to the Judicial Committee of the Privy Council.

"1965" Constitution from whence the said Officer's authority purported to emanate. The respondent in the litigation was Desmond Lardner-Burke, the Minister for Law and Justice, and hence the person responsible for the detentions under the Emergency Powers Act.

The case was heard at first instance by the General Division of the High Court of Southern Rhodesia, constituted in this instance by Lewis and Goldin, JJ. The case for the first applicant was presented by Mr. S.W. Kentridge. Mr. Kentridge commenced by pressing the point that under the Emergency Powers Act (he chose to disregard the purported amendment in March, 1966, which had substituted "Officer Administering the Government" for "Governor") only the Governor could proclaim a state of emergency, and he could only do this after an empowering resolution by the Legislative Assembly. (Mr. Kentridge again disregarded the purported amendment in March, 1966, which had thrust aside the term "Legislative Assembly" in the Emergency Powers Act, for the insertion of the term "Parliament", the latter term being defined with reference to the "1965" Constitution.) Counsel recognised that his client could only succeed by the successful impugnement of the "1965" Constitution. He pointed to the fact that the "1965" Constitution had not been the product of the amendment procedure laid down under the 1961 Constitution, from which, counsel argued, the High Court derived its authority. The implication which was the gist of counsel's submission, was that because

the court owed its power and existence to the 1961 Constitution it was only competent to adjudicate on and recognise such laws as were able to sustain their validity when tested by the criteria established for this purpose by the said Constitution.²⁰ Counsel urged that the court should be steadfast in upholding its source of authority, and resist deflection from duty by public opinion or by the constraints of force.

Mr. Kentridge anticipated the respondent's assertion that the condition known as state necessity existed in the country to validate the detentions irrespective of the validity of the "1965" Constitution, by repudiating this condition as unknown to the territory's laws.²¹

Since the doctrine of state necessity is alleged by those who resort to it to have emanated from Grotius, it is proposed here to give the relevant extract from his Book

- De Jure Belli ac Pacis, Bk. 1, Ch. IV, Sect. XV, -

which reads:

1. We have spoken of him who possesses, or has possessed, the right of governing. It remains to speak of the usurper of power, not after he has acquired a right through long possession or contract, but while the basis of possession remains unlawful. Now while such a usurper is in possession, the acts of government which he performs may have a binding force, arising not from a right possessed by him, for no such right exists, but from the fact that one to whom the sovereignty actually belongs, whether people, king, or senate, would prefer that measures promulgated by him should meanwhile have the force of law, in

20. 1966 R.L.R. 756, p. 759.

21. 1966 R.L.R. 756, p. 759.

order to avoid the utter confusion which would result from the subversion of laws and suppression of the courts.

Reverting now to the presentation of the case by Mr. Kentridge, the latter claimed that when Grotius expatiated on the imperative need to obey the usurper in preference to inhabiting in chaos, the author was writing of the situation in international law, and was in any case only exhorting citizens concerning their response in such a contingency. Counsel was anxious to insist that Grotius never meant to give direction to the courts.²²

Counsel refuted the relevance of the term "de facto" and "de jure" governments to a court of municipal jurisdiction. He was insistent that such terms were only appropriate in the context of litigation in foreign tribunals when the status of governments foreign to those tribunals was in issue.²³

Counsel further contended that the usurping government was illegal because the Secretary of State for Commonwealth Affairs had certified to that effect.²⁴

Counsel pressed on to examine the concatenation of cases in the United States of America heard after the Civil War where recognition was given to certain acts performed in the secessionist states during the course of the conflict.²⁵ The cases were litigated in the Supreme Court

22. 1966 R.L.R. 756, p. 760.

23. 1966 R.L.R. p. 756, at p. 760.

24. 1966 R.L.R. p. 756, at p. 761.

25. 1966 R.L.R. p. 755, at p. 762.

of the United States. He endeavoured to wrest these authorities into a separate category from that into which the present case settled. The first distinction offered by Counsel rested on the alleged sovereignty of the individual secessionist states as compared with the status of Southern Rhodesia as a British Colony. The contention of counsel which attributed sovereignty to the component states of the United States federation does not find support in constitutional theory. The fact that states in the U.S.A. enjoy power in certain defined functions of government does not confer sovereignty on them but merely invests them with a measure of autonomy with which the Federal Government, in the absence of constitutional amendment, cannot interfere. The powers of the Federal and State Governments are defined in the Constitution of the United States. The distribution of power is made by this Paramount Instrument of Government. The existence of a claim to power which defies the apportionment dictated by this Instrument is a direct denial of the ultimacy of the latter, and therefore unconstitutional in terms of the latter. The normal inviolability of the powers assigned to the constituent territorial units of the United States does not entitle any of those units to defy the authority of the very Instrument that has vested that inviolability in them, and should any of the said units attempt such defiance its action cannot be more constitutional than that taken by a colony defying the jurisdiction of the imperial authority. If both actions are rebellious and illegal it

is wrong of counsel to have suggested that the position of the seceding states of the U.S.A. in the Civil War was distinguishable from that of Southern Rhodesia after U.D.I.

The second basis of distinction formulated by counsel related to the fact that the cases in the U.S. Supreme Court were heard after the Civil War where the parties to the litigation were not seeking to question the authority of the Federal Constitution and where a decision of the court either way would not have undermined the court's acknowledgement of the supremacy of the Constitution, or conceded the claims of the secessionist states to disassociation from the Federation. If the cases had been heard, went on counsel, during the Civil War the recognition of acts performed within the secessionist states and in conformity only with the rules of government obtaining in those states, would no doubt have been withheld because of the detriment such recognition would inflict on the cause of constitutionality.²⁶

Counsel was careful to stress that the acts recognised by the U.S. Supreme Court were acts performed in the private sector. No administrative measures of the secessionist states were granted validity, even ex post facto. So, counsel reasoned, the U.S. cases could not assist the respondent.²⁷

26. 1966 R.L.R. 756, at p. 762. Counsel did not mention the detriment expressly, but that must have been the only tenable basis for his submission that acts during the conflict were to be upheld after the conflict but that similar acts were not to be recognised during the conflict.

27. 1966 R.L.R. 756, p. 762.

The respondent's case was argued by Mr. Rathouse.²⁸ He chose as his proposition of law the theory that when a legal order lost its efficacy its validity vanished with the latter. When a new order assumed the efficacy surrendered by the old, that new order succeeded to the latter's paramountcy. The facts of the situation, counsel proceeded, attested to the efficacy and hence validity of the "1965" Constitution.²⁹

Mr. Rathouse then adopted the alternative submission that even if the government of Mr. Smith was unlawful the necessity for the preservation of peace and the maintenance of law and order required that purported laws directed to these ends should be accorded validity.³⁰ He interpreted the succession of cases in the U.S. Supreme Court after the Civil War to which opposing counsel had referred and from which the latter had sought to distinguish the position in Southern Rhodesia, as authority for the proposition that all acts of a usurping government, including acts performed under its authority, are valid insofar as these do not infringe the just rights of citizens.³¹ As the acts of the Smith Government were directed to the preservation of the citizens' rights against sabotage and subversion, they ought to be validated on the authority of the cases, counsel concluded.³²

28. 1966 R.L.R. 756, p. 767.

29. 1966 R.L.R. 756, p. 767.

30. 1966 R.L.R. 756, p. 770.

31. 1966 R.L.R. 756, p. 770.

32. 1966 R.L.R. 756, p. 772.

The Solicitor-General, also for the respondent, asserted that opposing counsel were wrong to test the validity of the "1965" Constitution by the lodestone of the amendment procedure enjoined by the 1961 Constitution, because where the latter was overthrown, its canons of legitimacy were inappropriate criteria of constitutionality.³³

The point made by the Solicitor-General was dissented from by Mr. Kentridge. A part of the latter's reply, taken from the report of the case, will now be quoted:³⁴

To disregard the principle of legitimacy is to follow the edict of whoever happens to be in power. The court has not accepted office under the 1965 Constitution, and should not apply laws made under it. The authorities relied on by respondents are philosophic or political and, in some cases, a mere discussion of expediency. To adopt the Kelsen approach is to take a political decision. The other writers are critical of Kelsen. The court can only reconsider its position if it finds that its orders will not be carried out; as long as it sits under, and applies the laws as defined in the 1961 Constitution, it must assume it will be obeyed.....Grotius never contemplated a situation where a court was sitting in medias res to decide what the law is. He was dealing with when a citizen is entitled to make war on his ruler. However compelling the reality of the situation, it cannot receive support from the court. The fact that many citizens observe the laws of the present Government is no indication of their legality. They may be doing so for many reasons.³⁵.....In the present case, the

33. 1966 R.L.R. 756; p. 772.

34. 1966 R.L.R. 756, pp. 773-4.

35. The underlining is mine. Counsel thus makes emphatic his divergence from Kelsen's thesis in regard to efficacy being the sole criterion of validity.

court.....derives its jurisdiction from the Queen, owes its allegiance to the Queen and must recognize the Queen as sovereign and as possessing her lawful prerogatives..... What is done to first applicant's husband and second applicant is against the Constitution..... As the court derives from the Queen, before it can recognize Mr. Dupont³⁶ as head of the lawful Government, the Queen must recognize him. Otherwise, the court cannot. If the court does not say this, it ceases to be Her Majesty's court..... There is no doctrine imported into our law that a court must call something lawful which is against its constitution..... The law is clear. The court must uphold it. Even enjoining the court to maintain law and order, the Queen or the Governor cannot change the law. It might result in the Government appointing judges who were prepared to uphold the 1965 Constitution, but this would not lead to chaos.

Mr. May, for the second applicant, in his reply³⁷ maintained that unless a rebellion amounted to a successful revolution, the court would have to regard the old order as effective. According to Mr. May the rebellion had yet to prove itself successful in the territory. It is noteworthy that whereas Mr. May was prepared to acknowledge the validity of Kelsen's Thesis (counsel merely asserted that the facts were not such as to attract its application, thus conceding its validity in the right circumstances), Mr. Kentridge (for the first applicant and thus on the same side as Mr. May) had rejected the Thesis as utterly philosophical.

36. The Officer Administering the Government under the "1965" Constitution.

37. 1966 R.L.R. 756, pp. 774-5.

The case was heard in June and July (taking seven days in all) and the judgments were delivered in September (1966). The first judgment was given by Mr. Justice Lewis.

(a) JUDGMENT OF LEWIS, J.³⁸

His Lordship delineated the factual situation arising on and after U.D.I. in the following synopsis:³⁹

.....the Declaration of Independence occurred on the 11th November, 1965, in terms of which the Prime Minister and the members of his Cabinet purported to declare this country an independent sovereign state and to give to the country what I shall call 'the 1965 Constitution' in place of the existing 1961 Constitution. Since then, there can be no doubt that the factual position is that the Prime Minister and the members of his Cabinet, although dismissed by the Queen, have continued to exercise the powers which they formerly exercised prior to the Declaration of Independence, notwithstanding their dismissal. Again, as a matter of fact, it is clear that the Governor, although still resident in this country, has not exercised his powers as such and that the third respondent⁴⁰ in the application of Leo Baron had purported to exercise the Governor's powers as 'the Officer Administering the Government' in terms of the 1965 Constitution. Finally, the members of the Legislative Assembly elected under the terms of the 1961 Constitution, have continued to function under the style of the Parliament of Rhodesia in terms of the 1965 Constitution, and such Parliament has, since the Declaration of Independence, purported to ratify the 1965 Constitution.

38. 1966 R.L.R. 756, pp. 775-849.

39. 1966 R.L.R. 756, pp. 777-78.

40. Mr. Clifford Dupont who held the office of "Officer Administering the Government" in the "1965" Constitution.

The position as expounded by the learned judge is, as a matter of fact, and it purports to be nothing more, unassailable. It is incontestable that the Cabinet's dismissal from office did not result in their demission of the powers which they had formerly wielded. Nor was it ever contended that the Governor under the 1961 Constitution was still effectively seised of the powers he had prior to U.D.I. been able to exercise. A further event to which the learned judge had addressed his brief survey was the purported self-nurtured metamorphosis of the Legislative Assembly into the "Parliament of Rhodesia". This institution was in future to embody and exercise the country's legislative role.

After recapitulating the submissions of the opposing counsel, the learned judge focussed significance on the concession made by the respondents' counsel that the Declaration of Independence of November 11, 1965, was illegal. Counsel made evident his intention not to reply on the Declaration itself as proof of the acquisition of independence, but rested his claim to that status on the contended subsequent possession of effective control by the usurping government and the successful extrusion of the old order as established by the 1961 Constitution. The de jure status thus achieved, counsel had insisted, must, however, be retroactivated to the date of the Declaration even though on the latter date the demise of the old order had yet to be demonstrably accomplished.

His Lordship then stated the importance of deciding the status of Southern Rhodesia prior to U.D.I. He adopted the description of the country's status as offered by Professor de Smith in his book The New Commonwealth and Its Constitutions, part of the judge's quotation reading thus:^{41.}

The United Kingdom Government has publicly recognized the existence of a convention that Parliament cannot properly legislate on any matter within the competence of the Southern Rhodesia Legislature⁴², including the amendment of the Constitution, without the consent of the Southern Rhodesia Government.....there is no doubt that the United Kingdom is constitutionally bound (in the absence of a fundamental change of circumstances⁴³) by the limitations that it has expressly accepted.----- The Southern Rhodesia Legislature, moreover, is unique among the Legislative bodies of 'dependent' territories in having full power to make laws with extraterritorial effect.

The practical effect of the redistribution of federal powers upon the dissolution of the Federation might well be to leave Southern Rhodesia in a constitutional position not significantly different from that of a Dominion in, say, 1918⁴⁴. In purely constitutional terms a grant of independence at that point would not greatly enhance the control exercisable by Southern Rhodesia over its domestic affairs.

His Lordship expressed himself to have understood that the passage immediately preceding meant unavoidably that legal sovereignty could be acquired by Southern Rhodesia

41. 1966 R.L.R. 756, pp. 781-2.

42. At the Conference in 1961 relating to the formulation of the 1961 Constitution, the Government of Southern Rhodesia had requested that the Convention should be extended to embrace even matters NOT within the competence of the Southern Rhodesia Legislature regarding the government of the territory, but the Commonwealth Secretary at the time evaded commitment on this point.

43. I have emphasised this important but sometimes forgotten rider.

44. The underlining is my own.

only through an Act of the United Kingdom Parliament pursuant to that end. He also made mention that counsel for the rebel ministers refrained from protesting the efficacy of the attempted ratification of the "1965" Constitution by the "1965 Parliament", a forbearance with the wisdom of which his Lordship made clear his association.

The learned judge proceeded to examine the respondents' first contention which they founded on Kelsen's Theory⁴⁵ and related writings. (Their alternative submission was based on what is known as the Doctrine of State Necessity.) His Lordship, however, made bold to maintain that Kelsen's Theory, which postulated that once the old order was overthrown, validity was to be vested in the new, could not be appealed to in territories which had yet to win their independence. It is submitted that, although his Lordship did not explicitly say so, the reason why Kelsen's Theory could not assist rebellions within this class of territories is simply because, *ex hypothesi*, such territories cannot have legal orders of their own. A dependent territory does not, by definition, have a legal order of its own, because if it did it would no longer be dependent. Its system of government, being a subordinate phenomenon, forms only a part of the legal order of the mother country. Therefore, if a power were to overthrow the local and subordinate form of government, such overthrow would not destroy the legal order of which the relevant

45. The general principles of this theory are examined in Chapter 1.

dependency's system of government would only form a part. In short, a mere dependency does not possess the kind of complete constitutional structure within itself, as contemplated by Kelsen, as will entitle those who usurp its internal subordinate government to claim that they have overthrown an entire legal order such that a new legal order is necessarily established. This suggested basis of distinguishing dependent from independent territories in regard to the applicability of Kelsen's Theory must have been uppermost in his Lordship's mind when, in relation to dependent territories, he said that the Theory "can only apply where the revolution had not only succeeded internally but has also had the effect of successfully untying the apron-strings of sovereignty of the mother state."⁴⁶

His Lordship had, with reference to the situation above, said earlier:⁴⁷

In this connexion, it is pertinent to remark that those who point to the examples of other recent revolutions in other parts of Africa, such as Zanzibar, Ghana and Nigeria, which have succeeded internally, and seek to equate them with the situation in this country, on the basis that those countries, too have 'illegal regimes' in power, fall into the error of overlooking the fundamental difference that those countries were already independent sovereign states before those revolutions occurred. Hence, in each of those countries, as in Pakistan, the change of its Constitution or form of government by means of revolution was entirely its own affair, and the successful overthrow of the old order brought with it lawful status to the new regime internally and recognition of the new regime by other countries internationally.

46. 1966 R.L.R. 756, p. 790. The emphasis is my own.

47. 1966 R.L.R. 756, p. 790.

His Lordship then adverted to the constitutional position in Southern Rhodesia after the usurping government had acquired internal control without, however, also severing all her ties with the mother country, i.e., the United Kingdom.⁴⁸ Significance was attributed by him to his observation that Southern Rhodesia had historically been administratively detached from the domain of the Colonial Office. The United Kingdom had never assumed physical dominance over the territory nor had she ever been responsible for the direct administration of the territory. He laid stress on the convention by which the United Kingdom had bound itself to obtain the consent of the government of the territory before legislating on matters within the legislative competence of the territory, but his meticulous approach also led him to note with approval Professor de Smith's crucial qualification to the convention which was that the convention was to abate upon a fundamental change of circumstances, a proviso his Lordship had no hesitation in finding had been activated by the Unilateral Declaration of Independence. He decided that this act entitled "Britain, legally to reassert its sovereignty over this country in regard to its internal affairs."⁴⁹

The learned judge then directed his appreciation of the constitutional cataclysm to the essence of the controversy which, to him, was whether or not the territory had succeeded

48. 1966 R.L.R. 756, p. 793.

49. 1966 R.L.R. 756, p. 794.

in its attempted umbilical severance from the United Kingdom, because upon the resolution of this issue hinged the applicability of Kelsen's Theory of the Grundnorm to the situation obtaining in the territory.

His Lordship adopted the following diagnosis:⁵⁰

In my view, it cannot be suggested that there was also an ONUS⁵¹ upon Great Britain to assert its sovereignty by means of armed force directed against this country, and it cannot be said that the failure to do so amounts to a tacit recognition of the success of the revolution and an abandonment of its sovereignty over the country.⁵² That there has been such a reassertion of Britain's sovereignty over this country is clearly shewn by the passing of the British Act of Parliament, the Southern Rhodesia Act of 1965 (Chapter 76), on the 16th November, 1965. It is also clear that the British Government has taken measures to endeavour to put an end to the revolution. Sanctions have been imposed upon this country and the success or failure of these measures is still in doubt at the present time.....The court cannot decide as a fact that the revolution has succeeded or that it must succeed on that evidence.⁵³

Quite apart from this, however, and even if this court were to assume that the economic measures taken by the British Government in an endeavour to put an end to the revolution are doomed to failure, it cannot also assume that the British Government would in that event abandon the struggle. The present world situation is vastly different from what it was at the time when the American War of Independence was fought. There, the American Colonists, with the assistance of Britain's enemy at that time, France, succeeded in defeating the British on American soil by force

50. 1966 R.L.R. 756, p. 794.

51. The emphasis is that of his Lordship. His use of the word "also" in relation to "onus" was due to his having mentioned that Britain had the RIGHT to assert her sovereignty in the event of U.D.I.

52. The underlining is mine.

53. The emphasis is mine.

of arms and Britain acknowledged her defeat. There was no international organization to concern itself in the struggle. In the present situation, however, it could not be doubted that Britain would have the potential ability to put an end to the revolution; even if she had to resort to invoking the assistance of the United Nations for that purpose. In my opinion, it cannot be said that the 1965 Constitution or that the present Government is a lawful government until such time as the tie of sovereignty vested in Britain has been finally and successfully severed.⁵⁴

Another basis adduced by his Lordship for rejecting the contended de jure status of the "1965" Constitution was that it had purported to adopt the Queen as the Queen of Rhodesia, and thus as local Head of State. This part of the "Constitution" was axiomatically void because the Queen had neither consented to the title nor agreed to be represented by an Officer Administering the Government. Since a document as fundamental as a country's constitution could not be severable the "1965" Constitution capsized because its provision for the Head of State was void and of no effect.⁵⁵

Having thus accomplished the demolition of the asseveration that the "1965" Constitution was competent to validate itself through the adoption of Kelsen's Theory of the Grundnorm, the learned judge translated his scrutiny to respondents' counsel's alternative submission that the Doctrine of State Necessity enjoined the ascription of validity to the acts of a usurping government which were directed to the maintenance of law and order and designed

54. The emphasis is mine.

55. 1966 R.L.R. 756, p. 798.

for the general good of the populace over whom it had control. (It is important to bear in mind that the learned judge throughout his judgment identified one with the other, or at least did not distinguish between, laws of a de facto government and laws emanating from the operation of the Doctrine of State Necessity.) The learned judge then posed the question, consequent on his rejection of the de jure status of the "1965" Constitution, whether he was constrained to reject all the purported laws of the usurping government. His all-important reply, which sounded the death knell of the applicants' case, was utterly unequivocal:⁵⁶

I have already given my reasons for being unable to hold that the 1965 Constitution is the legal Constitution of this country, and there is no need to repeat them. If it is an inevitable consequence of that decision, as the applicants contend, that I cannot recognize anything done by the present Government, then it means I can no longer function as judge of this court. I am, however, instructed by the Governor, by whom I was appointed to my office as a judge on behalf of Her Majesty the Queen, to maintain law and order and to carry on with my normal task subject to the refraining from 'all acts which would further the objective of the illegal authorities'. In the context of this instruction, the last phrase must mean all acts which would directly and deliberately aid the revolution. The civil servants are similarly instructed to carry out their normal tasks. They, too, would find it impossible to comply with this instruction unless they recognized and obeyed the laws passed by the Rhodesia Parliament and administrative actions carried out by the present Executive, for the purposes of the preservation of peace and good government and the maintenance of law and order.

56. 1966 R.L.R. 756, pp. 810-11.

In this unique situation, therefore, the only way in which this court can continue to function as a court consistently with the Governor's instruction and consistently with its duty to the State is to invoke the maxim 'SALUS POPULI SUPREMA LEX'⁵⁷, which is, in effect, a doctrine of State necessity, and to recognize such laws and such administrative actions as are designed for the purposes just mentioned.⁵⁸

His Lordship appealed to the venerable authority of Grotius as propounded in the latter's De Jure Belli ac Pacis for support of the Doctrine of State Necessity which he had just added to the wealth of Southern Rhodesian constitutional practice. An excerpt from his quotation from Grotius is as follows:⁵⁹

We have spoken of him who possesses, or has possessed, the right of governing. It remains to speak of the usurper of power, not after he has acquired a right through long possession or contract, but while the basis of possession remains unlawful. Now while such a usurper is in possession, the acts of government which he performs may have a binding force, arising not from a right possessed by him, for no such right exists, but from the fact that the one to whom the sovereignty actually belongs, whether people, or king, or senate, would prefer⁶⁰ that measures promulgated by him should meanwhile have the force of law, in order to avoid the utter confusion which would result from the subversion of laws and suppression of the courts.⁶¹

The expression created by Grotius stating that the Sovereign "would prefer" that the usurper's laws be obeyed to the chaos that would follow disobedience to such laws, is

57. The emphasis is his Lordship's.

58. My own emphasis.

59. 1966 R.L.R. 756, p. 813.

60. My own emphasis.

61. My own emphasis.

known as the "implied mandate" which the learned judge regards as coterminous with the doctrine of necessity. This concept was devastated by Coccejus in his book "A Commentary on Grotius' 'De Jure Belli ac Pacis'", and the brilliant intellectual onslaught was quoted by the learned judge (although he sought to distinguish it from the case before the court) thus:⁶²

For, firstly: that conjecture of a wish has nowhere been proved nor, secondly, can it adduce any reason for allowing the power to enact binding measures. Indeed, thirdly, the measures of the usurper have meanwhile the force of law, even though a contrary wish both of the king and of the people were to have been established. And, fourthly, this follows from the nature of possession, which involves the power to govern. But, fifthly, on this fiction the usurper would act in pursuance of a tacit mandate, and to this extent would act lawfully, inasmuch as then the person would consent, who has the power to forbid.

To this formidable assault the learned judge returned a flaccid reply:⁶³

Whether or not Coccejus be correct in that respect, that part of the opinion of Grotius which he criticizes does not depend upon a mere fiction in the present case, because on a proper construction of the Governor's instructions⁶⁴ to which I have already referred, it appears that the wish of the sovereign is expressed in similar terms in the present situation for the preservation of the country.⁶⁵

62. 1966 R.L.R. 756, p. 819.

63. 1966 R.L.R. 756, p. 819.

64. The Governor had given a general instruction to everyone to continue doing his duty, but in such a way as not to promote the rebellion.

65. My own emphasis.

One may be excused for being just a little intrigued as to why the learned judge should have seen fit to give greater weight to the Governor's message than to the omnipotent authority of an Act of Parliament - the Southern Rhodesia Act, 1965 and its derivative Order in Council. How could the Governor's wish, even if it was meant in the way the learned judge maintained it signified, have survived the explicit and imperative language of the Southern Rhodesia Order which prohibited obedience to the "laws" of the usurping government? One is quite disquieted that the judge should have treated the Governor's message as "the wish of the sovereign" when the interpretation his Lordship gave it contradicted an Order in Council which Order, one would have thought, would have been the authentic voice of the sovereign. (By "sovereign" is of course meant the sovereign power as distinct from the office of the monarch.) The "implied mandate" doctrine has the simple but fatal flaw in that it purports to persist in the face of an express prohibition to do that which the "mandate" enjoins. It is a mockery of language to suggest that it is logically possible to imply a mandate to perform those acts and assume that power which the Sovereign has forbidden in the clearest and most forceful language. Again, as Coccejus has so effectively pointed out, the implied mandate would mean that the rebel government was acting with the authority of the lawful sovereign and ipso facto would cease to be a rebel government.

His Lordship concluded⁶⁶ that the extension of the state of emergency by the usurping government was "predominantly actuated" by the necessity to maintain law and order and provide good government, and the validity of the extension, founded as it was on the propriety of the preponderant purpose of good and stable government, could not be impugned by the "mere fact that there was also an additional and subordinate motive."⁶⁷ So long as the emergency regulations satisfied the dominant purpose in their design and mode of enforcement they were to be upheld as qualifying for the protection of the doctrine of necessity. He therefore found the detentions valid because the emergency regulations were found to have been designed to uphold the rule of law.

Before concluding the summary of the learned judge's decision it is proposed to recur to one limitation, which it is submitted is illogical, which his Lordship sought to impose on the powers exercised by the usurping government under the doctrine of necessity. Of the measures taken by the usurping government to combat the economic sanctions wielded against the country, his Lordship had observed:⁶⁸

Provided such measures could validly have been taken by the lawful Government prior to the 11th November, 1965⁶⁹, in terms of the 1961 Constitution, and provided they involve no unlawful interference with the

66. 1966 R.L.R. 756, pp. 842-3.

67. namely, the survival of the usurping government.

68. 1966 R.L.R. 756, p. 839.

69. My own emphasis.

rights of citizens under that Constitution, this court will not interfere.

It is not immediately obvious why the doctrine of necessity, which not only empowers but enjoins the performance of such acts as would sustain stable government and promote good administration, should have its operation reduced to the scope of the 1961 Constitution. Would his Lordship have us defend the striking down of an essential measure for the safety and success of the state on the ground that the measure was not one which a government under the 1961 Constitution was entitled to enact? Why is validity to be mandatorily attributable to essential measures performable under the 1961 Constitution, but inflexibly denied to measures no less essential not so performable? If the security and success of the state are potent enough to disregard the dictates of the British Parliament, why are the said imperatives of necessity to be restricted to such acts as were performable under the 1961 Constitution, which is only an authority clearly subordinate to the said Parliament? Unfortunately, throughout his elaborate judgment, no pointer has been offered by his Lordship in clarification of the possible foundation for such a restriction.

Perhaps Lewis J. was confusing the powers of a de facto government with a government functioning under the aegis of the doctrine of necessity, assuming the validity of these concepts. A de facto government is always illegal in the sense that it is not de jure. On the other hand, a

government run under the authority of the doctrine of necessity need not, but can sometimes be, an illegal government, because the activation of this source of authority, being founded upon the imperatives directed to national survival, cannot logically discriminate against an illegal government because the imperative of national survival does not disappear with legal authority. The express postulate of the doctrine of necessity, asserting as it does that the survival of the state is the supreme law, demolishes the significance of the status of those in a position to ensure this survival. The task of ensuring survival is not to be abandoned merely because it cannot but be entrusted to the care of those whose hands have been imbrued with the taint of illegality. The only limit to those exercising power under the doctrine of necessity, irrespective of their legitimacy, is therefore NOT that to which the previous, legal, government was subject, but that which does not exceed the enactment of measures necessary for the security and success of the state over which they have control. Whether something is necessary or not is a pure question of fact that has to be ascertained with reference to the prevailing circumstances. For reasons of speed, familiarity and efficiency this question of whether a measure is necessary or not ought to be left to the judgment and good faith of those who wield the executive authority, once the judiciary has pronounced that the situation is so desperate that only the flexibility and comprehensive compass of a doctrine of necessity can

restore to it a measure of order and security.

A government the status of which is de facto should not have its authority to act confined to doing what is necessary for the preservation of the state. It has usurped the position of the de jure government and arguably succeeds only to the power formerly wielded by the government it has displaced. But this government until it becomes de jure, and because until then it has merely succeeded to, by having usurped, the authority (and to nothing beyond) of the ousted de jure government, should not be allowed to do what the latter government could not have done. If this limit is removed there will cease to be any distinction between a de jure and a de facto government. The distinction was appreciated by Beadle, C.J., when this case went to the Appellate Division of the High Court. The distinction is made on grounds of logic. No useful authority can be found to help draw the distinction suggested.

(b) JUDGMENT OF GOLDIN, J.⁷⁰

Goldin, J., commented his judgment with a review of the events and factual consequences to date. He reduced his survey to eight points. As his first, he recited the Governor's message (published on the day of U.D.I. - November 11, 1965), part of which read:⁷¹

70. 1966 R.L.R. 756, pp. 849-81.

71. 1966 R.L.R. 756, p. 853.

.....I have informed Mr. Smith and his colleagues that they no longer hold office. I call on the citizens of Rhodesia to refrain from all acts which would further the objectives of the illegal authorities. Subject to that, it is the duty of all citizens to maintain law and order in the country and to carry on with their normal tasks. This applies equally to the judiciary, the police, and the public service. ⁷²

His Lordship's second point referred to the Governor's de facto displacement from the duties and powers vested in him under the 1961 Constitution. The third point directed notice to the obedience, again owed de facto, rendered by the armed forces and the civil service to the purported government that professed to rule under the "1965" Constitution. The Executive and Legislature of the 1961 Constitution purported to alchemize themselves into the cabinet and Parliament of the "1965" Constitution. This was his Lordship's fourth observation. The fifth point which caught his Lordship's attention was that the usurping government was enjoying effective control of Southern Rhodesia. Sixthly, the learned judge noted, the administration was not recognised, either de jure or de facto, by a single foreign Government. The next point adverted to by his Lordship was that although the United Kingdom Government had pledged itself to the restoration of "constitutional government"⁷³, it had confined its attempts to economic embargo against the country, assisted by various members of the United Nations. His final remark in this conspectus was that the United Kingdom Parlia-

72. My own emphasis.

73. The quotes on the phrase were made by the learned judge.

ment had passed the Southern Rhodesia Act, 1965, designed to impeach the pretensions of the usurping government by denying to the latter all semblance of authority to rule, and that the United Kingdom Government had exercised the plenary powers which the Act had vested in it. But the learned judge did not omit mention of the fact that such measures as had been enacted by Order-in-Council under the Act as purported to apply to Southern Rhodesia had not been enforced within the territory.

After a preliminary critique on the circumstances accompanying the applicants' detention, his Lordship indicated that the first question was whether or not the "1965" Constitution had superseded the 1961 Constitution.⁷⁴

His Lordship recapitulated counsel's submissions for the parties, which need not be repeated here. It will be recalled that counsel for the respondents had chosen to sustain the theory propounded by Kelsen and accepted by certain other jurists that an usurping government becomes a lawful government as soon as it has effective control of the state whose government it has evicted from power, in short, that effective governing is synonymous with lawful government. The inapplicability of this doctrine to the situation obtaining in Southern Rhodesia was demonstrated with forceful clarity by the learned judge in the following extract from his decision:⁷⁵

74. 1966 R.L.R. 756, p. 854.

75. 1966 R.L.R. 756, pp. 862-4.

The facts, however, do not justify the conclusion that, because the present government is the only effective government within Rhodesia and created the 1965 Constitution, in terms of which it governs, the 1961 Constitution has ceased to exist on the basis mentioned above.⁷⁶ Southern Rhodesia enjoyed virtually complete self-government under the 1961 Constitution and the effective control exercised by the present government is no greater than the powers conferred by the 1961 Constitution upon a lawful government and administration.⁷⁷ At this stage, Her Majesty or Her Majesty's Government of the United Kingdom have neither abandoned their respective rights and powers under the 1961 Constitution, and it cannot be said that the government of the United Kingdom is not capable of overthrowing or rendering ineffective the present regime..... There is certainly no evidence that outside the borders of this country, in the sphere of international relations, the British Government and Her Majesty have ceased to exercise effectively their rights and powers conferred upon them by the 1961 Constitution. In other words, although this Government has effective control within Rhodesia, it only claims to be or declares that Rhodesia is an independent State, but outside its borders it is neither accepted nor treated as such. On the contrary, in the sphere of international relations Rhodesia retains the status and powers conferred upon it by the 1961 Constitution⁷⁸..... The latter aspect is of particular relevance in deciding whether the 1961 Constitution has ceased to exist. In the case of Pakistan⁷⁹ the sovereignty of the State was not in issue but only the form and composition of its government. But in this case

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76. i.e. on the basis of the theories of Kelsen and concurring jurists.
77. i.e., because Southern Rhodesia did not acquire a wider area of control than that which it had enjoyed prior to U.D.I., it could not point convincingly to an elevation of its constitutional status. A government could not claim to represent a sovereign state if the power it effectively exercised was no more than that of a subordinate self-governing territory.
78. My own emphasis.
79. In 1958 the military in Pakistan overthrew the civilian government, and the Supreme Court of Pakistan recognised the military regime as the new lawful government of the country in Dosso's case.

Rhodesia could only be considered to have become a sovereign independent state when the 1965 Constitution has replaced the 1961 Constitution, which involves holding that the latter has ceased to exist.....the outcome of the struggle has still to be awaited⁸⁰.....the doctrines.....by which a successful revolution can successfully replace an existing lawful constitution have no application in the circumstances and upon the facts.....I hold the 1965 Constitution has not lawfully replaced the 1961 Constitution and that the 1961 Constitution has not been annulled or ceased to be the lawful constitution of this country. This court therefore derives its origin from and was lawfully constituted under the 1961 Constitution, and the judges thereof continue to hold office and are bound by the oaths taken by them in terms of the 1961 Constitution. ⁸¹

The learned judge then turned to respondents' counsel's alternative submission, which was that a refusal by the court to face reality, i.e. the de facto control of the territory by the usurping government, would inflict chaos on and introduce a legal vacuum in the body politic.⁸² Counsel propounded that laws passed by a government in de facto control should be given effect where such laws are directed to the preservation of peace and designed to promote the good government of the country. It was an averment of constitutional jurisprudence that earned his Lordship's concurrence, which was expressed in the following words:⁸³

.....the present government has displaced the lawful authority and, having established itself in the customary seats of power, exercises all the functions of legislation and administration

80. My own emphasis.

81. My own emphasis.

82. 1966 R.L.R. 756, p. 864.

83. 1966 R.L.R. 756, pp. 865-7.

.....There can be no doubt that, in these circumstances, the alternative before this court is either to cease to function or to give effect to all or to certain administrative and legislative measures performed by and emanating from the Government constituted under the 1965 Constitution. There is no substance in the submission that by refusing to give effect to measures of this government, those responsible for the 1965 Constitution and who hold office by virtue of that Constitution, would by order of court revert to what has been described as 'constitutional Government'. These persons undoubtedly know, and it was never contended by respondents to the contrary, that what is described as 'the assumption of independence' had no basis of legality and those who 'gave' the 1965 Constitution had no right or power at law to do so. Their conduct was based on decisions and circumstances which in their opinion provided economic or political justification despite the absence of legality. But whatever their motives, it would be completely unrealistic to even assume that the present situation can be altered by a decision of this court.....In my view, after careful consideration of the unprecedented situation in which this court finds itself, I am satisfied that the court can and should give effect to at least certain legislative measures, and administrative acts, performed by virtue of power exercised under the 1965 Constitution. I base my conclusion on the doctrine of public policy, the application of the which is required, justified and rendered unavoidable in these circumstances, by necessity.⁸⁴

When absolute necessity requires the court to function, and it can only function by giving effect to the legislative and administrative acts referred to above, then this doctrine can and should be invoked. The courts have not hesitated to apply the doctrine of public policy whenever the facts justified its application, because public policy does vary with situations and demands

84. The emphasis is mine. The doctrine is indistinguishable from, even if it was intended to treat it as something other than, the doctrine of state necessity.

of public interest. It fluctuates with the circumstances of the time and it depends on the welfare of the community at any given time. 85

A point of fundamental significance that demands attention is that Mr. Justice Goldin, unlike Mr. Justice Lewis, does NOT restrict the acts performable by the usurping government to those performable by a government under the 1961 Constitution. It is submitted that the approach of Mr. Justice Goldin is preferable in that it does not impose on the doctrine a limitation of power which is difficult to explain because in proposing that limitation Mr. Justice Lewis failed to offer any basis for it.

Finally, Mr. Justice Goldin was confronted with the problem, also encountered by his brother Lewis, of whether to offer validity to acts necessary for the security and good government of the state but also characterised by a propensity to aid the rebellion. His answer, which coincided with that given by his Brother Judge, was that it would be wrong to strike down a measure of good government merely because it would also entrench the rebellion. It is suggested that the learned judge would not have hesitated to strike down a law which was designed solely to ingrain the rebellion but which had the wholly adventitious effect of contributing to the welfare of the people. His Lordship's opinion in respect of this difficulty was expressed in these lines:⁸⁶

85. My own emphasis.

86. 1966 R.L.R. 756, p. 874.

But I do not think the problem can be resolved by laying down as a principle that measures or the exercise of functions which 'aid the rebellion' must not be given effect for that reason alone. The preservation of peace and order can be said to have that result... In my view, the administrative and legislative measures required for the maintenance of peace and order must be treated as effective and enforceable, regardless as to whether in doing so the unlawfully constituted Government benefits or not. 87

His Lordship then concluded that the Emergency regulations were required for the security of the state, and that it followed that the applicants' detention must be sustained. Like his Brother Lewis, the learned judge maintained that the onus of demonstrating, by way of establishing a prima facie case, that the detention was unconnected with the maintenance of law and order lay on the applicants. The applicants in this case had failed to discharge that burden. There was thus no need for the court to call upon the respondents to refute what would have been a prima facie case had the applicants succeeded in persuading the court that the orders for their detention were based on grounds other than concern for the peace and security of the state.⁸⁸

87. My own emphasis.

88. 1966 R.L.R. 756, p. 878.

(iii) MADZIMBAMUTO V. LARDNER-BURKE BEFORE THE APPELLATE
DIVISION OF THE HIGH COURT OF SOUTHERN RHODESIA 89

The appeal by the applicants to the Appellate Division of the High Court was heard in January, February and October, 1967, and judgment was delivered on January 29, 1968.⁹⁰ The members of the court who heard the appeal were Beadle, C.J., Quenet, J.P., Macdonald, J.A., Jarvis, A.J.A., and Fieldsend, A.J.A. Because the five judgments manifest much intricacy of argumentation it is proposed to provide very brief synopses of what they express before proceeding to the detailed examination of each judgment.

(a) Summary of Beadle, C.J.'s judgment.⁹¹

The learned Chief Justice began with the presupposition that the concept of legal sovereignty was divisible. He maintained that the internal autonomy Southern Rhodesia enjoyed by virtue of the extensive powers of self-government conferred under the 1961 Constitution entitled her to be internally sovereign, namely sovereign with regard to her internal affairs. However, because Southern Rhodesia's external affairs were under the charge of the United Kingdom, the latter was the territory's

89. 1968 (2) S.A. 284.

90. 1968 (2) S.A. 284.

91. 1968 (2) S.A. 284, pp. 290-361.

external sovereign. The subjects⁹² of Southern Rhodesia, so the Chief Justice reasoned, owed allegiance to Southern Rhodesia by virtue of the latter's internal sovereignty, but owed to the United Kingdom a residual allegiance because the latter was Southern Rhodesia's external sovereign. The Unilateral Declaration of Independence created a dilemma for the citizens of Southern Rhodesia in that it created a conflict between two sovereigns. But the learned Chief Justice entertained no doubt that such a confrontation of authority should be resolved in favour of the internal sovereign.⁹³ He was

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92. The British Nationality Act, 1948, had created Southern Rhodesia citizenship despite the fact that her constitution at the time - the 1923 Constitution - was a subordinate constitutional document, being granted under Letters Patent which expressly referred to the territory as a Crown Colony. That it is obvious that the conferment of citizenship is not a conferment of independence is illustrated by the fact that although Malayan Union-citizenship was conferred on people in the short-lived Malayan Union (1946-1948) in 1946, it is beyond all argument that this did not mean that the Malayan Union became independent in any sense of the word.
93. Even granting the Chief Justice the validity of the concept of divided sovereignty, is not his Lordship guilty of a grave error of identification in that, in assessing the constitutional position before U.D.I., he identified the internal sovereign as the Southern Rhodesia Government and Legislative Assembly, and not, as it is submitted it undoubtedly was, the 1961 Constitution? The Chief Justice spoke of allegiance being owed to Southern Rhodesia, but what does "Southern Rhodesia" signify? Allegiance could not be owed to a mere geographical entity; therefore, his term "Southern Rhodesia" could only, assuming but not accepting his concept of divided sovereignty, have referred to the internal sovereign in Southern Rhodesia, namely, the 1961 Constitution. Since the 1961 Constitution was never in conflict with the authority of the United Kingdom, the conflict of sovereignty envisaged by the Chief Justice, it must be assumed, was an oversight of a logical impossibility, induced by his having mistaken the identity of his internal sovereign.

thus convinced that the event of U.D.I. made inevitable the total allegiance of Southern Rhodesia citizens to the territory of Southern Rhodesia.

The Chief Justice also held that the 1961 Constitution was no longer functioning, but nor had the "1965" Constitution yet been able to establish itself. The usurping government, being unable to trace its validity to any constitution, was thus only a de facto government in the sense that it enjoyed a control over Southern Rhodesia that seemed likely to continue, although that control was not one that could be described as having been firmly established. Because the usurping government was only a de facto government, the Chief Justice continued, it could only do what a legal government under the 1961 Constitution could have done. The Chief Justice must have implied that for the usurping government to do anything beyond the ambit of the 1961 Constitution, it had to wait until the "1965" Constitution acquired de jure status.

The Chief Justice, in regard to the authority of the court, said that the court no longer sat under the 1961 Constitution, but did so only by virtue of the fact that the de facto government was prepared to enforce its orders.

Finally, the Chief Justice, although finding that the Minister of Law and Justice had authority to exercise the powers of detention under the Emergency Powers Act, found that the regulation under which the applicants had been detained was technically void because it had failed to

provide for the attention of the Minister. The applicant's success was necessarily ephemeral because he was immediately detained again after a fresh regulation had been made to comply with the provisions of the Emergency Powers Act.

Summary of the judgment of Quenet, J.P.⁹⁴

In regard to the authority of the court the learned Judge President said that the court had been created under the 1961 Constitution and its authority had not been impugned by the usurping government. Since its birth was unquestionably legal, and since it had never been put to death, the result was that it still survived.

Adverting to the issue of sovereignty, the Judge President adopted the concept of divided sovereignty which, as has been seen, was also favoured by the Chief Justice. The Judge President resolved the conflict of sovereignties consequent on U.D.I. in favour of the internal sovereign because the latter had an effective government to the laws of which citizens of Southern Rhodesia ^{are} ~~was~~ bound to render homage.

Although the Judge President stated that for the purposes of the litigation in question it was not necessary to decide whether or not the usurping government was a de jure government, he did proceed to pronounce on the question (such a pronouncement being thus necessarily rendered an

94. 1968 (2) S.A. 284, pp. 361-376.

obiter dictum), and concluded that the government and the "1965" Constitution were both de jure - the linkage of their fortunes is not surprising because one could hardly have been de jure without the other being equally so. The Judge President decided that whether a de facto government ipso facto became a de jure government, or whether it had to wait until it was unchallengeably established before it could become a de jure government, did not matter in the instant case because the usurping government was able to satisfy either of the two alternative criteria.

He, like the Chief Justice, awarded the applicants a pyrrhic victory because of the same technical invalidity of the regulation under which the applicants were detained.

Summary of the judgment of Macdonald, J.A.⁹⁵

The learned judge said that prior to U.D.I. the citizens of Rhodesia owed a territorial allegiance to the semi-independent state of Rhodesia, and owed an extra-territorial allegiance to the United Kingdom (described by the judge as "the State of Britain"⁹⁶). U.D.I. created a conflict between these two allegiances, and in such a combat the territorial sovereign was to enjoy the right to its citizens' allegiance as against the extra-territorial sovereign. The learned judge propounded that allegiance to

95. 1968 (2) S.A. 284, pp. 376-416.

96. 1968 (2) S.A. 284, p. 404F.

the territorial sovereign meant obedience to the laws of the effective government in the territory. He regarded as synonymous the terms "de facto government" and "government for the time being", and went on to expound that as far as a municipal court was concerned a government de facto was a government de jure. The 1965 Constitution was the territory's de facto constitution and therefore as far as its municipal court was concerned, the de jure constitution. All its laws must therefore be obeyed.

The judge allowed the appeal on the technical ground favoured by his colleagues.

Summary of the judgment of Jarvis, A.J.A.⁹⁷

The learned judge found that the usurping government was in effective control in Southern Rhodesia and that this control seemed likely to continue. However, he created a paradox by maintaining that the source of the court's authority was still the 1961 Constitution. For the sake of good government, he was prepared to allow validity to anything done by the usurping government that could also have been done by the previous legal government. His judgment is to be noted for its studious avoidance of the terms "de jure" and "de facto" in relation to the status of the usurping government. Also eschewed by him were the concepts of divided sovereignty and divided allegiance of which his preceding brother judges were so enamoured.

97. 1968 (2) S.A. 284, pp. 416-422.

He allowed the appeal on the technicality adopted by his colleagues.

Summary of the judgment of Fieldsend, A.J.A.⁹⁸

The usurping government, pronounced the learned judge, was neither a de facto nor a de jure government because it had only usurped two of the three Branches of government. The usurpation could not be complete until the judicial function had also been usurped and, that not yet being the case, the lawful constitution in the country was still the 1961 Constitution. However, because there was no lawful government under the 1961 Constitution, certain acts of the usurping government, which were directed to the ordinary orderly running of the country, could be validated under the doctrine of state necessity, provided that these acts did not violate the rights of the citizens as enshrined in the 1961 Constitution, and did not violate any rule of public policy, as, for instance, the rule against the entrenchment of the usurping government. The learned judge did not limit the action of the usurping government to those which could have been carried out by the previous, legal government.

He allowed the appeal on two grounds: on the technicality favoured by the remainder of the court as the sole ground of allowing the appeal; and on the ground that the detention was not allowable under the doctrine of

98. 1968 (2) S.A. 284, pp. 422-444.

state necessity because it was not required for the ordinary orderly running of the state, and it also violated the just rights of the citizens under the 1961 Constitution.

Having given the five judgments in summary, it is proposed to examine them in a little more detail. The judgments will be examined in the order in which they were delivered.

JUDGMENT OF BEADLE, C.J.

The learned Chief Justice began with a summary of the grounds of appeal.⁹⁹ Appellants had first contended that the court of first instance erred in regarding the Smith government as a de facto government. Secondly, appellants maintained that even if the government was correctly classified as a de facto government, the attribution of legality to its legislative and administrative acts was erroneous. Finally, even if the court appealed from did not err in conferring validity on certain laws and measures of the usurping government, it was at fault in specifically giving validity to the following three measures:

(1) the proclamation of a state of emergency by the third respondent on 4th February, 1966 (Proclamation 3 of 1966, published in Government Notice 57 of 1966);

99. 1968 (2) S.A. 284, p. 294.

(2) the making of the Emergency Powers (Maintenance of Law and Order) Regulations 1966 (published in Government Notice 71 of 1966);

(3) the continued detention of the appellants¹⁰⁰ in terms of such regulations.

The Chief Justice observed that the facts were to be considered as they stood at the time of the hearing of the appeal and not as at the time of the hearing at first instance.¹⁰¹

The Chief Justice initiated his substantive judgment by descanting on the status acquired by Southern Rhodesia under the 1961 Constitution. His remarks of importance were:¹⁰²

The White Paper (Command 1400), which set out what would be the detailed provisions of the constitution, made it plain that Rhodesia was to be given complete internal self-government..
.....A proper interpretation of the terms of the 1961 Constitution will show that they conform to what was offered the people of Rhodesia in the White Papers (Command 1399 and 1400).

He then cited two sections¹⁰³ in the 1961 Constitution which he asserted were designed to confer internal self-government of the kind described by him in the quotation.

100. Subsequent to the hearing of the second applicant's appeal the latter was released and when the hearing continued he amended his appeal to request for a DECLARATION that his detention by the respondent was unlawful (page 291 of the Chief Justice's decision).

101. 1968 (2) S.A. 284, p. 295.

102. 1968 (2) S.A. 284, pp. 296-7.

103. SS. 105 and 111 of the 1961 Constitution.

The two sections will here be quoted to draw attention to a flaw in the drafting of one of them which deprives the other of its entrenched effect.

Section 105 read:

Subject to compliance with the other provisions of this Constitution, a law of the Legislature may amend, add to or repeal any of the provisions of this Constitution other than those mentioned in Section 111:

Provided that no Act of the Legislature shall be deemed to amend, add to or repeal any provision of this Constitution unless it does so in express terms.

Section 111 read:

Full power and authority is hereby reserved to Her Majesty by Order in Council to amend, add to or revoke the provisions of sections 1,2,3,5,6,29,32,42,49, and this section, and any Order in Council made by virtue of this section may vary or revoke any previous Order so made:

Provided that the power and authority herein reserved to Her Majesty shall not be exercised for the purpose of amending this section or adding to it a reference to any section of this Constitution not included in this section on the appointed day.

The learned Chief Justice then moved on to comment:¹⁰⁴

Since the sections referred to in section 111 and incorporated by reference in section 105 could not be amended by the Legislature, some provision had to be made for their amendment, should such amendment ever be necessary; and this explains the reason for section 111, which provides the machinery for amending these sections.

Although it is not proposed to gainsay the interpretation given to the sections by the learned Chief Justice, attention ought to have been directed by him to the loophole

104. 1968 (2) S.A. 284, p. 299.

in S.105 which would have enabled the Southern Rhodesia Legislature to remove the powers of the United Kingdom altogether - a removal, however, which would have enjoyed the merit of not being a bootstraps exercise, or an exercise in circularity. It is to be noticed that S.105 itself could be amended by the Legislature of Southern Rhodesia. There was no prohibition of any kind on the amendment of S.105, provided the correct procedure was followed. S.105 could have been completely rewritten. It is therefore submitted that the deletion of two phrases from, and the addition of one phrase to, S.105 by amendment through the local Legislature (with the consent of the people in the four specified racial referenda) would render S.111 itself subject to local amendment. The two phrases to be deleted would have been:

(1) "Subject to compliance with the other provisions of this Constitution", and

(2) "other than those mentioned in Section 111".

The phrase that would have had to be inserted at the beginning of the section is:

"Notwithstanding anything in this Constitution".

The amended S.105 would then have read:

"Notwithstanding anything in this Constitution a law of the Legislature may amend, add to or repeal any of the provisions of this Constitution:

Provided that no Act of the Legislature shall be deemed to amend, add to or repeal any provision of this Constitution unless it does so in express terms."

The local Legislature could then have repealed S.111 of the Constitution under the authority vested in it under the amended and expanded S.105. Having abolished S.111 the local Legislature could have amended the sections embodied in the said S.111 at will. The assertion may sound excessive, but if the thesis suggested above is correct, need there have been a Unilateral Declaration of Independence? Could not the local Legislature have terminated the United Kingdom's sovereignty in the very terms and upon the very authority of the 1961 Constitution itself, which was directly derived from, and therefore enjoyed the authority of, a British Act of Parliament (the Southern Rhodesia Act, 1961, under the authority of which the 1961 Southern Rhodesia (Constitution) Order-in-Council, which embodied the 1961 Constitution, was made)? The Chief Justice might well be astonished to learn that his review of the powers given to Southern Rhodesia under the 1961 Constitution was less favourable to his country than it ought to have been.

The Chief Justice then proceeded to examine the power conferred on the local Legislature by the 1961 Constitution of enacting laws with extra-territorial effect.¹⁰⁵ He described this authority as "Another adjunct of self-government".¹⁰⁶ He treated this investiture of power as placing Southern Rhodesia on a constitutional pedestal above

105. 1968 (2) S.A. 284, p. 299.

106. 1968 (2) S.A. 284, p. 299.

that of the Dominions before the Statute of Westminster, 1931, because the Dominions did not enjoy that item of authority until the Statute.

His Lordship was careful to mention the convention acknowledged by Britain in CMND. 1399 to the effect that Britain would not legislate on those matters within the competence of the local Legislature.¹⁰⁷ He surmised thus:¹⁰⁸

It may be said, therefore, that before the Declaration of Independence Southern Rhodesia had for all practical purposes complete internal independence.

Another point of significance stressed by the Chief Justice was the authority vested in Southern Rhodesia to create her own citizenship in company with other countries which were independent states. His Lordship expressed the view that this fact of association was evidence that Britain regarded Southern Rhodesia as just another independent Dominion for the purposes of the Act.¹⁰⁹

His Lordship concluded:¹¹⁰

The effect of the 1961 Constitution was to give Southern Rhodesia a measure of self-government almost amounting to, but just falling short of, full independence. Full independence required a further Act of the United Kingdom Parliament, applying the provisions of the Statute of Westminster to Southern Rhodesia.

The learned Chief Justice eventually turned his attention to the status of the usurping government.¹¹¹ He

107. 1968 (2) S.A. 284, p. 299.

108. 1968 (2) S.A. 284, p. 299.

109. The British Nationality Act, 1948.

110. 1968 (2) S.A.L.R. 284, p. 300.

111. 1968 (2) S.A.L.R. 284, p. 309.

at once dismissed the suggested decisiveness of the Certificate of the Secretary of State maintaining that Southern Rhodesia was not recognised by the United Kingdom as either having a de facto or de jure government other than the United Kingdom Government. He, correctly, stated that such Certificates were only relevant to a domestic court considering the status of a foreign government and hence its laws. Such Certificates could have no bearing on a domestic court attempting to decide on the validity of domestic laws.¹¹² The reason why such Certificates are accepted by domestic courts in regard to questions concerning foreign sovereigns is that the latter ^{are} ~~is~~ invariably treated as ~~a~~ questions of fact, so that the acceptance of such Certificates, and thus the acceptance of the authority of the executive arm of government, by the courts does not constitute an infringement of the judicial power. Conversely, such Certificates cannot be of any relevance to a domestic court adjudicating on an issue concerning its own laws, because to accept such Certificates in such a context would be tantamount to allowing the Executive to dictate to the Judiciary what the law of the land should be interpreted to be. This would be a clear violation of the judicial prerogative because the interpretation of the domestic¹¹³ law belongs, not to the executive,

112. These were not his actual words but a synopsis of what he said.

113. The term "domestic" need cause no controversy; it has the same meaning as "local" and "municipal", used in distinction to "international" or "foreign".

but to the judiciary.

Alternatively, the Chief Justice said that the Certificate, even if, contrary to his opinion, it were conclusive of the usurping government's status, was not preclusive of the court's power being exercised to give validity to the laws made by that government.¹¹⁴ As authority for this proposition he quoted from the judgment of Lord Wilberforce in the case of Carl Zeiss Stiftung v. Rayner and Keeler Ltd.¹¹⁵ The excerpt from Lord Wilberforce's judgment chosen by the Chief Justice of Southern Rhodesia was:¹¹⁶

Merely because in the class of case, of which Luther v. Sagor is an example, non-recognition of a 'government' entails non-recognition of its laws, or some of them, it does not follow that in a different situation this is so, nor that recognition of a law entails recognition of the law-maker as a government with sovereign power. The primary effect and intention of non-recognition by the executive is that the non-recognised 'government' has no standing to represent the state concerned whether in public or in private matters. Whether this entails non-recognition of its so-called laws, or Acts, is a matter for the Courts to pronounce on, having due regard to the situation as regards sovereignty in the territory where the 'laws' are enacted and, no doubt, to any relevant consideration of public policy.

The Chief Justice triumphantly pointed to this obiter dictum as authority for the proposition that a court was not bound not to recognise the laws of a non-recognised government.

114. 1968 (2) S.A. 284, pp. 311-13.

115. 1967 A.C. 853, 961.

116. 1968 (2) S.A. 284, p. 312. The underlining is that of Beadle, C.J.

The Chief Justice was thus stating that the Certificates regarding the status of foreign governments were inappropriate to an examination of domestic law by a domestic court. Alternatively, if the Certificate of the Secretary of State could apply to the usurping government in Southern Rhodesia, there was Lord Wilberforce's obiter dictum to say that this did not entail also the non-recognition of its laws.

His Lordship then advanced towards the question of revolutionary situations, and examined judicial decisions in certain Commonwealth countries where the courts had been seised of a similar predicament.¹¹⁷ The learned Chief Justice professed himself fortified by two decisions in courts of other Commonwealth countries in saying that a domestic court was competent to examine the legality of its own government.¹¹⁸

He embarked on the inquiry into the meaning of the terms "de jure government" and "de facto government", and without either the reinforcement of precedent or the support of detailed explanation, he maintained that the meaning these terms bore in international law, and their relevance to the latter, were both to be adopted by municipal law. He illuminated his assertion thus:¹¹⁹

117. 1968 (2) S.A.L.R. 284, 313-26.

118. The two decisions are from Pakistan and Uganda, respectively STATE v. DOSSO (1958) 2 Pakistan Supreme Court Reports 180, and UGANDA v. COMMISSIONER OF PRISONS, EX PARTE MATOVU (1966) E.A. 514.

119. 1968 (2) S.A. 284, p. 314.

Both expressions are ones which are generally used more in international than municipal law, but I can see no reason why an international law definition should not be used by a municipal court, because it would seem that, if a government conformed to an accepted international law definition of either a *de jure* or a *de facto* government, then a *fortiori* it should be recognised as such by a municipal court.

The Chief Justice then quoted Herbert Morrison's definition of the terms "*de jure* government" and "*de facto* government" in the context of issuing Certificates according or refusing recognition to foreign governments. On March 21, 1951, the Secretary of State for Foreign Affairs made a statement in the House of Commons, part of which read as follows:¹²⁰

....it is international law which defines the conditions under which a government should be recognised *de jure* or *de facto*, and it is a matter of judgment in each particular case whether a régime fulfils the conditions. The conditions under international law for the recognition of a new régime as the *de facto* government of a state are that the new régime has in fact effective control over most of the state's territory and that this control seems likely to continue. The conditions for the recognition of a new régime as the *de jure* government of a state are that the new régime should not merely have effective control over most of the state's territory, but that it should, in fact, be firmly established. His Majesty's Government consider that recognition should be accorded when the conditions specified by international law are, in fact, fulfilled and that recognition should not be given when these conditions are not fulfilled. The recognition of a government *de jure* or *de facto* should not depend on whether the character of the régime is such as to command His Majesty's Government's approval.

120. HANSARD, Vol. 485, col. 2410. (House of Commons.)
Herbert Morrison was then Foreign Secretary.

From this extract of Herbert Morrison's statement the Chief Justice chose the following excerpt with his own emphasis, as indicated:¹²¹

The conditions under international law for the recognition of a new regime as the de facto government of a state are that the new regime has in fact effective control over most of the state's territory and that this control seems likely to continue. The conditions for the recognition of a new regime as the de jure government of a state are that the new regime should not merely have effective control over most of the state's territory, but that it should, in fact, be firmly established.

The learned Chief Justice then pronounced:¹²²

If in the instant case the stage is reached when it can be said with reasonable certainty that the revolution has succeeded; then in the eyes of international law¹²³ Rhodesia will have become a de jure independent sovereign state, its Grundnorm will have changed¹²⁴ and its new constitution will have become the lawful constitution.

No one doubts that a successful revolution, in international law, confers legitimacy on the incoming Government. But in municipal law what possible right has a domestic court to pronounce on the validity or invalidity of a government in control? It is not the function of a court of municipal jurisdiction to confer or refuse legitimacy to a government enjoying effective control of that municipality. Its status cannot be a matter for domestic litigation but its standing, whether legitimate or illegitimate

121. 1968 (2) S.A. 284, p. 315.

122. 1968 (2) S.A.L.R. 284, p. 315.

123. My own emphasis.

124. It is wrong to speak of a "change" in the Grundnorm when a dependent territory ascends to independent status because prior to independence the dependent territory cannot claim a Grundnorm of its own. The translation of the territory to the higher status should be defined as the acquisition of a Grundnorm.

contd.....

must simply be a fundamental, indeed the fundamental, presupposition of law in the municipality for no other reason than that if the question were municipally litigable there could be no tribunal entitled to adjudicate.

The Chief Justice then approached what was the kernel of his decision:¹²⁵

The attitude of this Court towards the revolution is undoubtedly one of the facts which must be taken into account in determining, first, whether or not the present Government is in 'effective control', and, second, what the likelihood is of it remaining in such control. I think this is the proper place which the attitude of this Court occupies in these proceedings..... As the territory has been so governed for the past two years by the present Government, I consider it must now be accepted that the present Government 'is in fact in effective control over the state's territory' and therefore satisfies the first part of the definition¹²⁶, which applies both to a de facto and a de jure government. I reach this conclusion after paying due regard to the attitude of this Court towards the revolution and to the part it has played during the past two years. ¹²⁷

I turn now to deal with the second part of the definition, that is, the likelihood of the present Government continuing in such effective control.....I will consider first what bearing the fact that the Court has not 'joined

Footnote 124 continued...

It is illogical to speak of X's Grundnorm when X does not even possess a legal order from which alone a Grundnorm can find its role. The point is important and will be pursued in the Critique in the next Chapter.

125. 1968 (2) S.A. 284, pp. 320-26.

126. My own emphasis.

127. This is difficult to distinguish from the phenomenon of "joining the revolution" from which the Chief Justice was labouring to dissociate the High Court.

the revolution' has in deciding this question. If the fact that this Court has not 'joined the revolution' seems likely to prevent the present Government from continuing in effective control, then this fact might well prove decisive in deciding its status. If, on the other hand, this fact is not likely to have any bearing on this issue, then it will be an irrelevant consideration.....As a question of fact.... I find that the attitude of this Court is not a significant factor¹²⁸ in determining the likelihood of the present Government continuing in effective control of the Government of the territory.....Perhaps the most pertinent evidence of all, however, is the fact that more than two years have elapsed since the Declaration of Independence; and, as I have said, the present Government is still in effective control. It is here that events speak eloquently. Nothing succeeds like success; and this is particularly true of revolutions.¹²⁹ The longer the present Government remains effectively in control, so much more likely is it that it will continue indefinitely to remain in such control.....On the evidence I come without hesitation to the conclusion that to-day it 'seems' likely that the present Government will continue in control, because I cannot see that any other possibility 'seems' at all likely.

Does the evidence, however, justify a more positive finding; a finding that on a balance of probabilities it 'is' likely to remain in control, so likely as to justify holding that it can now be said that the present Government is 'firmly established'?¹³⁰ The evidence goes very nearly as far as to justify such a finding; but predicting accurately the future here is not an easy task..... At this stage, therefore, I am hesitant about accepting the opinion evidence of the respondents' experts that events will necessarily turn out the way they predict.

128. My own emphasis.

129. My own emphasis.

130. When Herbert Morrison made his distinction between de facto and de jure governments concerning the practice of the British Government in respect of the recognition of foreign governments, little did he realize that his mental exertion would one day be exalted to an imprimatur of legality for a rebelling British dependency by Her Majesty's Chief Justice in that dependency.

They may well do so, but I do not think there is sufficient evidence before me at the moment to hold that they WILL¹³¹ do so.....I sum up on this question of status, therefore, by finding that the 'status' of the present Government is that of a de facto government, in the sense that it is in fact in effective control over the State's territory, and that this control 'seems' likely to continue. I do not find on the evidence before me that at this stage it can be said to be so 'firmly established' as to justify a finding that its status is yet that of a de jure government; because, as I have said, I find that the evidence on what 'is' likely to happen in the future is not yet sufficiently conclusive.

Not a little jurisprudential commotion is fomented by the knowledge that the learned Chief Justice has not thought it precarious to recline on a statement by a British Foreign Secretary - Herbert Morrison - for exclusive support of his ratio decidendi. He analysed the words of the Foreign Secretary with the patient excogitation usually reserved for Acts of Parliament, and acknowledged to those words a decisiveness of authority in a context for which they were never meant. The Foreign Secretary had merely been enlightening the Members of the House of Commons on the circumstances in which His Majesty's Government would accord the right type of recognition to foreign governments. The statement was never intended to be definitive of judicial pronouncements on the validity of domestic legislation. Having reached the conclusion that the usurping government could not be resisted in its claim

131. The emphasis is that of the Chief Justice.

to de facto status, the learned Chief Justice proceeded to explore the measure of obedience to which that status entitled the government. His inquiry satisfied him of this view:¹³²

The present Government has effectively usurped all the governmental powers under the old Grundnorm, but has not yet succeeded in setting up a new Grundnorm¹³³ in its place. As a result of this effective usurpation it can do anything which the Government it usurped could have done; but until the present Government has achieved the status of a de jure Government, and the revolutionary Grundnorm becomes the new Grundnorm, it must govern in terms of the old Grundnorm There is, I know, no precedent for this principle, but this is because the problem facing this Court is an unprecedented one.....

Having decided on the powers of a de facto government, his Lordship turned to the validity of the Proclamation and the regulation under which the appellants' detention was continued. He found the relevant regulation¹³⁴ void because it did not provide for the individual attention to the extension of the several detainees' confinement that the empowering Act required - the regulation invalidated had purported to extend detentions automatically without further consideration of the Minister concerned. On this

132. 1968 (2) S.A. 284, p. 351.

133. Is there then no Grundnorm in the interregnum? Is this logically possible? Does this not mean that the Chief Justice was denying that laws had an ultimate source of authority? But other than this it is proposed to concur with the limitation he imposed on the powers of the de facto government, if he had been commenting as a jurist, hence only descriptively, and not as a judge, who speaks necessarily prescriptively.

134. 1968 (2) S.A. 284, 359.

technical ground, the appeal was upheld. But the ease with which the regulation was amended ensured that the victory was pyrrhic.

DECISION OF QUENET J.P.¹³⁵

The essence of the learned judge's decision was that the authority vested in Southern Rhodesia by the 1961 Constitution was such as bestowed internal sovereignty on that territory, consequentially only requiring of the said territory an allegiance to the external sovereignty of the United Kingdom. The Declaration of Independence had precipitated a choice of sovereigns in that the latter no longer harmonised. His Lordship thought that sovereignty should be resolved in favour of the government enjoying effective control, the de facto government.¹³⁶ He formulated the proposition that a de facto government was either automatically a de jure government (citing Kelsen) or eligible for de jure status after a period of stability (relying on Bryce).¹³⁷

In respect of the investiture of de facto status on the Smith Government his Lordship offered this exposition:¹³⁸

One must.....in each case examine the limitations upon independence and decide whether or not they are inconsistent with the existence of internal sovereignty. In terms of the 1961 Constitution the

135. 1968 (2) S.A. 284, pp. 361-76.

136. 1968 (2) S.A. 284, pp. 366-7.

137. 1968 (2) S.A. 284, pp. 368-9.

138. 1968 (2) S.A. 284, pp. 366-8.

Legislature was given power to make laws for the peace, order and good government of Southern Rhodesia..... the power to legislate included the making of laws having extra-territorial operation..... Section 1 of the British Nationality Act, 1948 envisaged the creation of Southern Rhodesian citizenship. I am in no doubt the limitations upon sovereignty arising from the provisions of Section III did not prevent the operation of internal sovereignty Before the Declaration of Independence the duty of allegiance owed by Southern Rhodesians was divided it was owed in part to the United Kingdom and in part to Southern Rhodesia....conflict... now exists between the present Government and the Government of the United Kingdom.... where allegiance was owed to an external and an internal sovereign, internal sovereignty was the more important.....because without such an authority peace and order in a community would disappear....In the two years following the Declaration of Independence the present Government has established itself as the country's paramount authority. In the field of positive or national law it is the sole law-maker..... It maintains the courts and is in exclusive control of the country's administration and of its national forces..... There can be no doubt that since 11th November, 1965, it has been the country's effective de facto government.

On his attribution of de jure status to Mr. Smith's government his Lordship sustained his decision thus:¹³⁹

.....some indicate that lawfulness is the sine qua non of effectiveness, others that a testing time must elapse before a de jure position is reached. Wheaton.....puts the matter in this way:

'Sovereignty is acquired by a State, either at the origin of the civil society of which it is composed, or when it separates itself from the community of which it previously formed a part,¹⁴⁰ and on which it was dependent.

139. 1968 (2) S.A.L.R. 284, pp. 368-9.

140. My own emphasis.

This principle applies as well to internal as to external sovereignty. But an important distinction is to be noticed, in this respect, between these two species of sovereignty.¹⁴¹ The internal sovereignty of a State does not require the recognition of other States..... The existence of the State de facto is sufficient..... to establish its sovereignty de jure. It is a State because it exists.'

This view accords with Kelsen's theory¹⁴² as applied in the Pakistani and Ugandan cases..... It is a view which avoids the paradoxical conclusion that, even though the laws of a de facto Government have binding force the source of those laws, that is to say, the de facto government, might itself be unlawful.....;The other point of view is expressed by Bryce: ¹⁴³

'Sovereignty de facto, when it has lasted for a certain time¹⁴⁴ and shown itself stable, ripens into Sovereignty de jure.'

On either approach..... the present Government has achieved internal de jure status. ¹⁴⁵

Since the learned judge concluded that the usurping government was endowed with de jure status (the inexorable corollary being that the "1965" Constitution was likewise soldered onto the de jure pedestal) there could be no consequence but that all its laws were entitled to enforcement by

141. My own emphasis.

142. My own emphasis. This is a correct rendering of Kelsen's Theory in my submission.

143. My own emphasis.

144. Hence the effectiveness must pass the test of temporal endurance which is not specified as required by Kelsen.

145. My own emphasis. The point about internal and external sovereignty is important and will be examined in the Critique in the following Chapter.

and obedience from the court. The only issue outstanding therefore was the validity of the regulations published under the authority of the Emergency Powers Act (the right of the government to exercise the powers therein being assured to it by its de jure status) were valid, and in particular regulation 47(3) under which the appellants had their initially valid detentions continued. In this regard he was content to concur with the learned Chief Justice in striking down the regulation.¹⁴⁶

As a matter of incidental import it is proposed to probe the connotations of the terms de jure and de facto government. When a government is displaced by a rebellion the evicted sovereign is commonly classified as de jure and the successful (at least for the time being) party of rebellion becomes the de facto government. The former is the depository of legitimacy and the latter the repository of actual control. But when the latter attains to de jure status what is the status of the former? Assuming that the logical conclusion is that the ousted de jure government is then to be stripped of its de jure status, are there then not two meanings to the term, the first being that of an ousted legal government, and the second that of a usurping government which through endurance finally achieves the status of a legal government? The former meaning asserts the status of a legal government without control of the territory in question, whereas the

¹⁴⁶. 1968 (2) S.A. 284, p. 374.

latter defines the position of a legal government with control of the territory concerned. Should there not be a distinction between a government with both legality and power, and one with only the attribute of legality? It is suggested that the term should be restricted to allusion to a government that is both legal and efficacious, and that a legal ousted government should be known as an ex de jure government, such that where a legal government has been unseated and the usurping government has yet to demonstrate the endurance of its effectiveness there is to be NO de jure government, but only a de facto and an ex jure government. The subsequent success of either will then decide which is to succeed to the title of de jure government. This will have the merit of demanding from the de facto government evidence of its continued ability to govern and dispel the spectre of an evanescent regime, and of penalising the ex de jure government for a protracted lapse of control, thus discouraging the proliferation of governments in exile which, while not having the means of effective government, often harass those who have successfully secured stability and are only concerned to strengthen and continue that stability. There is no reason why prolonged failure to recapture the seat of power by an ousted or ex de jure government should not delete the latter from the dictionary of constitutional jurisprudence.¹⁴⁷

¹⁴⁷. The confusion has been mentioned at this stage so as to enable it to be understood that the terms are not being used consistently by the judiciary.

DECISION OF MACDONALD, J.A.¹⁴⁸

With no disrespect to the erudition of the learned judge it can be maintained without fear of its being regarded as an unwarranted disparagement, that his judgment, though lacking nothing in length, was not opulent in legal theory. All he said was that Southern Rhodesia had the right as a semi-independent country to the internal allegiance of her subjects, necessitating that she concede only the external allegiance of her people to the United Kingdom in the latter's capacity as the country's external sovereign. The Declaration of Independence forced on the people of Southern Rhodesia the choice between two competing sovereigns, a choice that had to be resolved in favour of the internal sovereign because the latter enjoyed de facto control of the territory. For the purposes of municipal law, the learned judge asserted, a de facto government was synonymous with one that was de jure. If the Government led by Mr. Smith was de jure the 1965 Constitution was de jure. Since the Queen had declined the Headship of the country, Southern Rhodesia was a de facto republic. He disallowed the regulation in question on the technical ground favoured by the other judges of the court. It is not proposed to offer analysis in regard to the learned judge's marathon dissection on the laws of treason and allegiance. The essence of his decision appears in the following extract:¹⁴⁹

148. 1968 (2) S.A. 284, pp. 376-416.

149. 1968 (2) S.A. 284, pp. 384-5.

There are a number of reasons for the unanimous acceptance by English jurists of a duty to obey the laws of a sovereign power established within the state by revolution:

(i) First and foremost among these is the fundamental concept that allegiance is due in return for actual¹⁵⁰ protection. The corollary of this is that allegiance is not due to a sovereign power which, while claiming the theoretical right to protect, fails to afford protection.

(ii) Secondly, and most importantly, there is the need in the interests of the state and its people to ensure the continuity of the law and avoid the anarchy which would result from a legal vacuum.

(iii) A third reason, refreshingly free from cant and hypocrisy, is the appreciation by jurists that, because governments without exception have an extra-legal origin, courts exercising jurisdiction within a state must, if they are to function at all, obey the laws of the Government 'for the time being'.¹⁵¹ If a court of law anywhere in the world were to insist that only the laws of a government with a legal origin¹⁵² may be obeyed and enforced, it would not be able to function because there is no such government. The feature which distinguishes one government from another is not that some have an extra-legal and others a legal origin but simply the variation in the length of time separating all existing governments from their extra-legal origin. Although the government 'for the time being'¹⁵³ within a state shares with all other governments the taint of extra-legal origin it has the obvious merit of being the only effective law-making and law-enforcing body within the state. To refuse to obey the laws of such a government is to take not a legal but a revolutionary, or a country-revolutionary stand.

150. The learned judge's own emphasis.

151. The learned judge's own emphasis.

152. The emphasis is that of the learned judge.

153. His Lordship's emphasis.

It will be recalled that the learned judge had earlier spoken of a conflict between two allegiances owed to two sovereigns. It may be pertinent to remark on the fact that even if Southern Rhodesia could have been regarded as an internal sovereign, such a status could only have been conceded by virtue of the 1961 Constitution. Throughout his elaborate judgment nowhere did the learned judge deny that whatever status his country enjoyed immediately prior to U.D.I. was owed to the provisions of the 1961 Constitution. Now if the 1961 Constitution (and the 1923 Constitution before it) had conferred internal sovereignty on Southern Rhodesia, that sovereignty could axiomatically be enjoyed only on the terms on which it was conferred. Far from there being a "conflict" between two rival sovereigns upon U.D.I., the "internal sovereign" had logically ceased to exist as a constitution^{al} phenomenon on that occasion for the simple reason that it was no longer constituted in the terms in which it was created. If the "internal sovereignty" of Southern Rhodesia was defined as X it is plain that Y, whatever it may be, is not the same thing. If there was thus no "internal sovereign" there could not have been that "conflict" to the purported resolution of which the learned judge had dedicated such minuteness of elaboration. Even if it is suggested that the 1961 Constitution did nothing so exalted as to confer internal sovereignty on Southern Rhodesia, but had merely given expression to it, the Smith Government would still be denied succour from it because if the 1961 Constitution expressed, and declared, that

"internal sovereignty" could only be X, then a purported internal sovereignty otherwise expressed or declared is necessarily other than X and therefore not the internal sovereign. So, it is immaterial that the 1961 Constitution might have been only declaratory, and not constitutive, of that internal sovereignty of Southern Rhodesia by which the learned judge had set such great store.

DECISION OF JARVIS, A.J.A.¹⁵⁴

The learned judge introduced his decision with a concise appraisal of the events to which the issue before the court owed its existence. Part of the survey read:¹⁵⁵

The apparent object of the 1965 Constitution was to establish Southern Rhodesia as an independent sovereign state within the British Commonwealth, with the Queen as its head. The unlawful act of repudiating the 1961 Constitution, the Declaration of Independence, the purported substitution (which collectively may be said to have constituted an act of usurpation), and the lack of enforcement of the legislative measures taken by the United Kingdom, have, in combination, brought about a state of affairs in which Southern Rhodesia, as a matter of strict law, is without an effective, lawful government, although this Court, duly constituted for the purposes of the 1961 Constitution, has continued to sit in mediis rebus without interference.

Like Beadle, C.J., before him, the learned judge found that the usurping government was in effective control of the country, and that such control appeared likely to be maintained.¹⁵⁶

154. 1968 (2) S.A. 284, pp. 416-22.

155. 1968 (2) S.A. 284, p. 417.

156. 1968 (2) S.A. 284, p. 418 (c).

At this juncture it is proposed to focus attention on a very important point made by the learned judge. He asserted, in contradistinction to the attitude of his three Brother Judges before him, that the court derived its authority from the 1961 Constitution, and not the 1965 Constitution.¹⁵⁷ He made this acknowledgement a proposition of law although he was not unprepared to admit, as a proposition of fact, that the tenure of office by the judges was made precarious by the de facto power wielded by the Smith government. The learned judge's posture is significant because the de facto power of the usurping government, in his view, did not impair the status of the court as an organ of the 1961 Constitution, unless and until the government removed those judges who did not acknowledge the validity of the "1965" Constitution.

The present Government has submitted¹⁵⁸ to the jurisdiction of this Court in the knowledge that the original source of that jurisdiction is the 1961 Constitution. Had this Court derived its jurisdiction from the 1965 Constitution, it would have been prevented from giving decision in this case by reason of the provisions of Section 142 of that Constitution, which prohibits ANY¹⁵⁹ court from enquiring into the validity of ANYTHING¹⁶⁰ done under the provisions of that Constitution. At the same time it must, I think, be acknowledged that as a matter of fact (but not of law)¹⁶¹ the tenure of office of the Judges of this Court since the Declaration of Independence has become, in a sense,

157. 1968 (2) S.A.L.R. 284, p. 419.

158. My own emphasis.

159. The learned judge's own emphasis.

160. His Lordship's emphasis.

161. My own emphasis.

PRECARIOUS¹⁶² by reason of the provisions of section 128(4)(b) of the 1965 Constitution, which the present Government has the power to enforce. Subject to this acknowledgment, I consider that the source of the jurisdiction of this Court is still the 1961 Constitution and that the present Government has not usurped its functions.¹⁶³

Having found that the court functioned under the 1961 Constitution, the learned judge reached the conclusion earlier arrived at by Beadle, C.J., that the Smith Government, being the only effective government within the country (he did not use the term "de facto"), was entitled to do such things as were performable under the 1961 Constitution. His own words were:¹⁶⁴

If, therefore, the powers of internal autonomy already granted to the territory by the 1961 Constitution are exercised by the only body in the territory at present capable of functioning as a government, then, it seems to me, that the quality of law and legality may legitimately be attached to both the legislative and administrative acts of that body so long as they conform with the Declaration of Rights in the 1961 Constitution and do not go beyond anything a lawful government under that Constitution could have done. I consider, therefore, that legal effect can be given to such legislative measures and administrative acts of the present Government as would have been lawful in the case of a lawful government governing under the 1961 Constitution.

He agreed with the learned Chief Justice as to the validity of the Proclamation and the invalidity of the regulation under which the appellants were detained.¹⁶⁵

162. His Lordship's emphasis. S. 128(4)(b) provided for the dismissal of those judges who should refuse allegiance to the new "1965" Constitution.

163. My own emphasis.

164. 1968 (2) S.A.L.R. 284, pp. 421-2.

165. 1968 (2) S.A.L.R. 284, p. 422.

His Lordship had granted the Smith Government limited recognition because of "the social need to preserve peace, order and good government".¹⁶⁶

It is not clear, unfortunately, whether the learned judge attributed the restricted recognition of the Smith government to the fact that it enjoyed de facto status or to the applicability of the doctrine of state necessity. He placed express reliance on neither concept.

DECISION OF FIELDSEND, A.J.A.¹⁶⁷

As I appreciate the problems that arise in these appeals, the decision must turn upon the answers to two principal questions: one involves the very source of authority of the Court itself, and the other concerns the powers and duties of the Court, depending upon what is found to be the source of its authority.¹⁶⁸

Such was the manner in which the learned judge introduced his judgment.

His assessment of the constitutional position was succinct, as can be discerned from the extract following:¹⁶⁹

The position can best be summarised by saying that effective executive and legislative machinery under the 1961 Constitution is completely in abeyance¹⁷⁰, and that executive and legislative control is firmly in the hands of the usurping authorities, who are ordering the day-to-day affairs of the country and have been two years.....Although the present authorities have not invoked section 128(4) to compel any Judge to take the prescribed oath on

166. 1968 (2) S.A.L.R. 284, p. 421(D).

167. 1968 (2) S.A.L.R. 284, pp. 422-44.

168. 1968 (2) S.A.L.R. 284, p. 422.

169. 1968 (2) S.A.L.R. 284, p. 425.

170. My own emphasis.

pain of loss of office without compensation, they can have been in no doubt that the Court¹⁷¹ has not accepted the 1965 Constitution as the valid constitution of the country.

The learned judge then went on to hold that the usurping government was decidedly not de facto because it had only been able to usurp two of the three constituents of the sovereign authority, namely that it had not acquired control of, or compelled acquiescence from, the Judiciary even though it had taken over the Legislature and the Executive. Since the government was not de facto the British Treason Act of 1495 (initially English only) which excused obedience to a de facto sovereign could not avail the present usurping government.¹⁷²

His Lordship then made a valuable contribution to constitutional jurisprudence by questioning the right of a domestic court to decide on the status of its government. He observed:¹⁷³

Whatever may be the position in the case of a court in the United Kingdom, it is my firm conviction that a court created in terms of a written constitution had no jurisdiction to recognise, either as a de jure or de facto government, any government other than that constitutionally appointed under that constitution. If it were to do so it would only be declaring that it was incompetent to give a decision because its raison d'être had disappeared. This would be an absurdity and is the strongest possible argument to show that the inquiry we were invited to embark upon is

171. It is not clear whether the learned judge was referring to the majority of all the judges of the High Court, or to only the particular panel of judges sitting on the appeal concerned. The underlining of the word is mine.

172. 1968 (2) S.A. 284, pp. 427-8.

173. 1968 (2) S.A. 284, p. 431.

beyond the Court's competence.¹⁷⁴ A court cannot sit to decide under what system of government it is exercising jurisdiction. It must accept its reason for existence as stemming from its original constitution as an unchallengeable fact. It was common cause that there had been no constitutional¹⁷⁵ abrogation or replacement of the 1961 Constitution or of the court created by it, and so far as this Court is concerned, if it continues to sit, as it has, that concludes the matter. There is no room in the proceedings of a domestic tribunal for the application of broad theoretical jurisprudential principles in order to determine whether a government exists in its territory de facto or de jure, or whether certain norms receive general obedience in its territory, and are therefore to be enforced.

The learned judge then propounded the doctrine of state necessity which entitles certain measures of an illegal government to be enforced by the courts provided they are necessary for the welfare of the community, but his Lordship concluded that the regulation in question was not required for the ordinary orderly running of the state and that therefore it could not have the doctrine invoked in its favour.¹⁷⁶

The learned judge described the doctrine of state necessity in what must constitute the essence of his decision:¹⁷⁷

.....it seems that the only proper conclusion is that natural justice, in the form of a controlled common sense, dictates that, for the welfare of the mass of people innocently caught up in these events, validity must be accorded to some acts of the usurping authorities, provided

174. My own emphasis.

175. The underlining is mine and his Lordship must have meant that word in the sense of "legal".

176. 1968 (2) S.A. 284, p. 443.

177. 1968 (2) S.A. 284, pp. 439-440.

that no consideration of public policy to the contrary has to prevail. It is unnecessary, and indeed undesirable, to attempt to define precisely the limits within which this validity will be accorded. ¹⁷⁸ The basis being broadly necessity, the decision is one which must be arrived at in the light of the circumstances of each case.

In a general way one can say with justification that administrative acts and legislation directed to and reasonably required for the ordinary orderly running of the country should be accorded validity, provided that they do not defeat the just rights of citizens under the 1961 Constitution, and are not actually intended to aid and do not have the natural and probable consequence of directly aiding the usurpation. If there is any doubt as to whether the acts fall within the main category then the act will not be upheld, nor will it be upheld if there is a possibility that thereby the just rights of citizens will be defeated or the usurpation directly aided.

Applying the doctrine which he expounded above, Fieldsend, A.J.A., concluded that the continuation of the applicants' detention without the consideration of the Minister concerned was a very serious infringement of personal liberty which the respondents had failed to satisfy the court was necessary for the ordinary orderly running of the country. The respondents had failed to do so because they had made no attempt to justify their act with reference to the criterion of necessity insisted on by the learned judge. This failure was fatal to the validity of the regulation. ¹⁷⁹

The regulation was also void because it was ultra vires the empowering Act. ¹⁸⁰

¹⁷⁸. The emphasis is mine.

¹⁷⁹. 1968 (2) S.A. 284, p. 443.

¹⁸⁰. 1968 (2) S.A. 284, p. 443.

It is proposed to end this synopsis of the litigation in the Appellate Division of the High Court with a quotation, whose logic is difficult to resist¹⁸¹, from the judgment of Fieldsend, A.J.A.:¹⁸²

Once it is accepted, as, in my view, it must be, that this Court is sitting as a court of the 1961 Constitution, it follows that, in determining what the law is on any given topic, it must be bound by that Constitution. There can, in my view, in the present circumstances, be no half-way house in regard to the Courts: either they derive their authority from the 1961 Constitution or from the 1965 Constitution.¹⁸³ If they derive their authority from the 1965 Constitution they must be bound by it entirely, even to the extent of being precluded from inquiring into its validity (sec. 142¹⁸⁴); if they derive their authority from the 1961 Constitution then they must be bound by that. A court which derives its existence and jurisdiction from a written constitution cannot give effect to anything which is not law when judged by that constitution.¹⁸⁵ To hold otherwise is to abandon a stable anchorage and to set sail into uncharted and, indeed, unchartable seas. The law to be administered by a municipal court is not an abstract concept, determined by general and theoretical jurisprudential principles; it is something concrete determined solely by the set of norms prescribed by the

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181. However, in the Critique in the following Chapter, an attempt will be made to review this passage critically, in regard to its relationship with the doctrine of necessity as propounded by Fieldsend, A.J.A.
182. 1968 (2) S.A. 284, p. 432.
183. The underlining is mine. Is not his doctrine of necessity precisely the kind of half-way house which he pronounces to be constitutionally inconceivable?
184. This section was from the "1965" Constitution.
185. It is remarkable how the learned judge in the face of this very strong statement by himself could have accepted a doctrine of necessity.

legal order upon which the court
considering the case is founded.¹⁸⁶

(iv) MADZIMBAMUTO'S CASE BEFORE THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL ¹⁸⁷

The Judicial Committee enjoyed appellate authority in respect of Southern Rhodesia in regard to violations of the Declaration of Rights as expounded in the 1961 Constitution.¹⁸⁸ Under the "1965" Constitution, however, the Judicial Committee had no right whatsoever to hear any appeals from the High Court of "Rhodesia", which court was declared to be the final tribunal in the land.¹⁸⁹

Consistently with their postulate that the "1965" Constitution was the only lawful constitution in and over Rhodesia, the Minister of Law and Justice for Rhodesia declined to be a party to the appeal by the appellants to the Judicial Committee. The "respondents", who would have been the Rhodesian Minister for Law and Justice and the Officer Administering the Government, were, their refusal to appear

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186. Again, this uncompromising posture should have precluded his own subsequent acceptance of the doctrine of necessity in the judgment. The incongruity must have escaped the learned judge as he made no attempt to reconcile his absolute observance of the 1961 Constitution with his resolute exposition of the doctrine of necessity which he so forcefully championed.
187. [1969] 1 A.C. 645. Leave to appeal was given by the Privy Council although it had been refused by the Appellate Division of the High Court: 1968 (2) S.A. 457.
188. Constitution of Southern Rhodesia (1961) - 1961 S.1. 2314 - S. 71(5).
189. S. 65 of the "1965" Constitution.

before the Judicial Committee notwithstanding,
 "represented" by amici curiae.¹⁹⁰

The appeal to the Privy Council was taken by the first applicant, but not by the second. This was not an appeal against the express decision of the Appellate Division of the High Court but against its implied approval of the fresh detention order that was made against the first applicant's husband after the High Court had taught the Smith government how it could serve an *intra vires* order. The appeal was in law against the implicit opinion of the High Court that a fresh detention order which was not an automatic continuation of the old, would be valid.¹⁹¹ The applicant's counsel submitted that no such fresh detention order could be valid because the government which issued it was wholly illegal, and was neither *de facto* nor *de jure*. Also, the doctrine of state necessity was alleged to be inapplicable to the circumstances.

The members of the Board who sat on the appeal were Lord Reid, Lord Morris of Borth-Y-Gest, Lord Pearce, Lord Wilberforce, and Lord Pearson. Lord Reid delivered the majority judgment allowing the appeal, but Lord Pearce dissented, and he would have dismissed the appeal.

190. These were J.G. Le Quesne, Q.C., Andrew Bateson and Stuart McKinnon.

191. [1969] 1 A.C. 645, p. 648(A) and (B). It is not immediately obvious how one could appeal against a FAVOURABLE decision. The appellant's case had been upheld by the Appellate Division of the High Court.

JUDGMENT OF THE MAJORITY¹⁹²

In his majority decision Lord Reid posed three questions the answers to which he thought were decisive of the appeal. These were:¹⁹³

(1) What was the legal effect in Southern Rhodesia of the Southern Rhodesia Act, 1965, and the Order in Council¹⁹⁴ which accompanied it? (2) Can the usurping government now in control in Southern Rhodesia be regarded for any purpose as a lawful government? (3) If not, to what extent, if at all, are the courts of Southern Rhodesia entitled to recognise or give effect to its legislative or administrative acts?

His Lordship then advanced to answer the first question. He maintained that conventions of the British Constitution, with particular reference to the British Convention not to legislate for Southern Rhodesia on matters within the legislative competence of the latter, could not derogate from the legal power of Parliament. He also adopted the stance that U.D.I. might have released the United Kingdom Government from the obligation of non-interference embodied in the convention. He was adamant that the 1961 Constitution made no grant of limited sovereignty to Southern Rhodesia, even assuming it was possible for the United Kingdom Parliament ever to make such a cession of power. Also, there was nothing in the 1961 Constitution to suggest that certain powers had been ceded as sovereign

192. [1962] 1 A.C. 645, pp. 710-731.

193. [1962] 1 A.C. 645, p. 721.

194. The important provisions of both the Act and the Order are reproduced at the beginning of this Chapter.

authority whereas the remaining sovereign powers were to be reserved to the United Kingdom. This being the case, the 1965 Southern Rhodesia Act and the subsequent Order-in-Council, emanating as they did from an absolute sovereign, had full legal effect in Southern Rhodesia.¹⁹⁵

His answer to the second question was negative.

His words were:¹⁹⁶

With regard to the question whether the usurping government can now be regarded as a lawful government much was said about de facto and de jure governments. Those are conceptions of international law and in their Lordships' view are quite inappropriate in dealing with the legal position of a usurper within the territory of which he has acquired control. ¹⁹⁷

He agreed with the results reached by the courts in Pakistan and Uganda to the effect that where a government has effectively displaced a former lawful government, the domestic court had the right to recognise the successful usurper as the new legitimate government of the country. However, he sought to distinguish those decisions by arguing:¹⁹⁸

It would be very different if there had been still two rivals contending for power. If the legitimate Government had been driven out but was trying to regain control it would be impossible to hold that the usurper who is in control is the lawful ruler, because that would mean that by striving to assert its lawful right the ousted legitimate government was opposing the lawful ruler.

195. [1969] 1 A.C. 645, pp. 722-3.

196. [1969] 1 A.C. 645, p. 723.

197. My own emphasis.

198. [1969] 1 A.C. 645, p. 725.

Subsequent to this extract, Lord Reid (for the majority) made a startling error of fact by claiming that the majority of the judges in the Appellate Division of the High Court of Southern Rhodesia still regarded themselves to be sitting under the lawful sovereign. In fact the majority of those judges (Beadle, C.J., Quenet J.P., and Macdonald J.A.) had made it unmistakable that they did not sit as judges of the lawful sovereign.

Lord Reid concluded that the usurping government in Southern Rhodesia could not be regarded as a lawful government.¹⁹⁹

His Lordship then addressed his attention to the third question of whether validity can be given to any of the legislative or administrative acts of the usurping government. He decided that the doctrine of state necessity could not avail such acts. He rejected the relevance of this doctrine to the issue in these words:²⁰⁰

It may be that there is a general principle, depending on implied mandate from the lawful Sovereign, which recognises the need to preserve law and order in territory controlled by a usurper. But it is unnecessary to decide that question because no such principle could override the legal right of the Parliament of the United Kingdom to make such laws as it may think proper for territory under the Sovereignty of Her Majesty in the Parliament of the United Kingdom. Parliament did pass the Southern Rhodesia Act, 1965, and thereby authorise the Southern Rhodesia (Constitution) Order in Council, 1965. There is no legal vacuum in Southern Rhodesia. Apart from the provisions

199. [1969] 1 A.C. 645, p. 725G.

200. [1969] 1 A.C. 645, p. 729.

of this legislation and its effect upon subsequent 'enactments' the whole of the existing law remains in force. But it is necessary to determine what, on a true construction, is the legal effect of this legislation.

The provisions of the Order in Council are drastic and unqualified. With regard to the making of laws for Southern Rhodesia section 3(1)(a) provides that no laws may be made by the Legislature of Southern Rhodesia and no business may be transacted by the Legislative Assembly: then section 3(1)(c) authorises Her Majesty in Council to make laws for the peace, order and good government of Southern Rhodesia: and section 6 declares that any law made in contravention of any prohibition imposed by the Order is void and of no effect. This can only mean that the power to make laws is transferred to Her Majesty in Council with the result that no purported law made by any person or body in Southern Rhodesia can have any legal effect, no matter how necessary that purported law may be for the purpose of preserving law and order or for any other purpose. 201 It is for Her Majesty in Council to judge whether any new law is required and to enact such new laws as may be thought necessary or desirable.

His Lordship thus found the relevant regulation void and allowed the appeal.

THE DISSENTING DECISION OF LORD PEARCE²⁰²

Lord Pearce concurred with the first two answers of the majority judgment delivered by Lord Reid. He did not deny that the 1965 Southern Rhodesia Act and the Order-in-Council thereof were validly passed, nor that the usurping government could not even be accorded de facto

201. My own emphasis.

202. [1962] 1 A.C. 645, pp. 731-45.

status.²⁰³ He denied, however, that the Act and Order-in-Council had prevented the validation of certain of the usurping government's measures through the operation of the doctrine of state necessity. He expressed himself to be in agreement with Fieldsend, A.J.A., in the Appellate Division of the High Court. However, he went on to say, alternatively, that the doctrine of state necessity was to prevail even if it was irreconcilable with the Act and Order-in-Council. He expressed the latter opinion thus:²⁰⁴

There is no indication in the Order in Council that it intended to exclude the doctrine of necessity or implied mandate by enjoining (inconsistently with the Governor's directive)²⁰⁵ continuing disobedience to every act or command which had not the backing of lawful authority. Even had it done so,²⁰⁶ I feel some doubt as to how far this is a possible conception when over a prolonged period no steps are taken by the Sovereign himself to do any acts of government and the result would produce a pure and continuous chaos or vacuum.

Earlier, Lord Pearce gave his appraisal of the situation in these words:²⁰⁷

The practical factual situation in Rhodesia is this. The judges lawfully appointed under the 1961 Constitution and representing its judicial power, have been entrusted by both sides with the duty of continuing to sit. They have continued to sit as judges under the

203. "The de facto status of sovereignty cannot be conceded to a rebel government as against the true Sovereign in the latter's courts of law." ([1969] 1 A.C. 645, p. 732.)

204. [1969] 1 A.C. 645, p. 745.

205. It is difficult to appreciate why the noble lord thought it necessary that an Order-in-Council should be consistent with the Governor's general message. Surely it is the converse that is logically necessary.

206. My emphasis.

207. [1969] 1 A.C. 645, p. 737.

1961 Constitution although the country is in the control of an illegal government which does not acknowledge any right of appeal to their Lordships' Board. This is an uneasy compromise which has been adopted by both sides from, no doubt, a consideration of many factors. The primary reason, one presumes, is the reasonable and humane desire of preserving law and order and avoiding chaos which would work great hardship on the citizens of all races and which would incidentally damage that part of the realm to the detriment of whoever is ultimately successful. 208

Lord Pearce distilled what he conceived to be the essence of the doctrine of necessity thus:²⁰⁹

I accept the existence of the principle that acts done by those actually in control without lawful validity may be recognised as valid or acted upon by the courts, with certain limitations namely (a) so far as they are directed to and reasonably required for ordinary orderly running of the State, and (b) so far as they do not impair the rights of citizens under the lawful (1961) Constitution, and (c) so far as they are not intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful Sovereign. 210 This last, i.e., (c), is tantamount to a test of public policy.

In this view of the matter I agree with the judgment of Fieldsend A.J.A.

208. My own emphasis.

209. [1969] 1 A.C. 645, p. 732.

210. The underlining is mine. Here Lord Pearce appears to have infringed the canons of logic because he is prepared to impute to the lawful Sovereign an intention that contradicts, and presumably is to be treated as overriding, the express dictate of the lawful Sovereign, as unequivocally underlined in the 1965 Act and Order in Council, that the laws of the usurping government were to be void and of no effect.

Lord Pearce purported to derive his authority for the existence of the doctrine of state necessity from the series of cases brought before the Supreme Court of the United States of America, in the aftermath of the Civil War, in which the latter made legal history by propounding the proposition that acts necessary to the maintenance of law and order as well as those relating to domestic and commercial transactions, notwithstanding the fact of their being performed in a territory under the control of an unlawful government, are to be treated as valid in law: provided such acts are not designed to, and do not in operation, entrench the unlawful government.²¹¹

It is proposed to cite only one of the several extracts Lord Pearce quoted from this series of American cases. One of Lord Pearce's quotes, taken from Horn v. Lockhart²¹², reads:²¹³

211. Lord Pearce accepted the doctrine as propounded through this series of decisions but, as will be shown in the Critique in the next Chapter, signally failed to accept the extreme narrowness with which the doctrine was applied to factual situations. Most of the U.S. judges, whilst eloquently preaching the doctrine, in fact rejected its applicability to the circumstances involved before them. This most pertinent fact was not mentioned by Lord Pearce.

212. (1873) 84 U.S. 570, 580. This case in fact decided AGAINST the applicability of the doctrine on the facts. This was not mentioned to Lord Pearce.

213. [1969] 1 A.C. 645, pp. 733-4.

.....We admit that the acts of the several States in their individual capacities, and of their different departments, of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil governments, or the regular administration of the laws. ²¹⁴ Order was to be preserved, police regulations maintained, ²¹⁵ crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary States touching these and kindred subjects, where they were not hostile in their purpose or made of enforcement to the authority of the National Government, and did not impair the rights of citizens under the Constitution......²¹⁶

It was suggested by counsel for the appellant that the American cases were inappropriate to the present litigation because they were decisions given AFTER the rebelling States in the Union had been subdued, whereas in the instant litigation the court was asked to give a decision DURING the course of the Rhodesian rebellion.

214. The underlining is mine.

215. The underlining is mine.
This is the analogy most apt to the detention of the appellant's husband - Daniel Madzimbamuto.

216. My own underlining.

This was how Lord Pearce dismissed the suggested distinction:²¹⁷

I do not accept the argument that because the cases all took place AFTER²¹⁸ the rebellion had failed, and were therefore concerned only with retrospective acknowledgment of unlawful acts, their principle cannot be applied DURING²¹⁹ a rebellion. If acts are entitled to some retrospective validity, there seems no reason in principle why they should not be entitled to some contemporaneous validity. It is when one comes to assess the question of public policy that there is a wide difference between the retrospective and contemporaneous. For during a rebellion it may be harmful to grant any validity to an unlawful act, whereas, when the rebellion has failed, such recognition may be innocuous.²²⁰

Purporting to apply the doctrine of necessity to the case in hand, Lord Pearce found that the Proclamation of a state of emergency and the detention order in regard to Daniel Madzimbamuto were valid in that they complied with what he thought to be the criteria enjoined by the

217. [1969] 1 A.C. 645, p. 733.

218. This emphasis is that of Lord Pearce.

219. The emphasis is that of Lord Pearce.

220. The underlining is mine.

It is disturbing to find that Lord Pearce should be false to his own admonitory dictum, in that he was prepared to allow greater latitude to a government in current rebellion (in allowing it to detain citizens) than that which the judges of the United States Supreme Court were prepared to allow to a government whose rebellion had already been quelled (in that in Horn v. Lockhart even an investment in bonds issued by the Confederate Government, and authorised for investment by the rebelling State where the investment was made, was held void).

doctrine.²²¹ He would have dismissed the appeal.²²²

(v) THE REACTION OF THE RHODESIAN JUDICIARY
TO THE DECISION OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

The reaction of the Rhodesian Judiciary to the decision of the Privy Council in Madzimbamuto's case was made categorically known in the case of R. v. Ndhlovu and Others²²³ heard before the Appellate Division of the "High Court of Rhodesia". Before we examine Ndhlovu's case, however, it is proposed to analyse a series of decisions (Dhlamini and Others v. Carter, N.O. and Another)²²⁴ which were given before the hearing of the Madzimbamuto case before the Privy Council.²²⁵ This series of decisions all concerned one case being litigated at three stages: the substantive case; the refusal of leave for the case to proceed to the Privy Council; and the rejection by the "High Court of Rhodesia" of the commutation granted by the Queen to the men condemned to death. The substantive decision²²⁶ asserted²²⁷ that the Prerogative of Mercy formerly

221. [1969] 1 A.C. 645, p. 741 E-F.

222. [1969] 1 A.C. 645, p. 745 F.

223. 1968 (4) S.A. 515.

224. 1968 (2) S.A. 445, 464 and 467.

225. This series of decisions was, however, not mentioned by either counsel or the judges in the Madzimbamuto case before the Privy Council.

226. 1968 (2) S.A. 445.

227. The word "asserted" in contradistinction to the otherwise invariable word "decided" is used here advisedly because, the constitutional position being uncertain, the authority of the court itself is in question.

exercisable by the Governor-in-Council under the 1961 Constitution (S. 49 thereof) was now in fact exercisable by the Executive Council as constituted under the "1965" Constitution on whose advice the Officer Administering the Government, who technically grants the pardon on the Queen's behalf, must act in the matter (S. 53 of the "1965" Constitution).

In the second decision of the case the convicted men applied for a declaratory order to the effect that they could appeal to the Privy Council against the decision on the substantive question mentioned above the Appellate Division of the High Court, under S. 71(5) of the 1961 Constitution.²²⁸ They also asked for a temporary interdict (extending the one they already had) to enable them to appeal to the Privy Council. The Appellate Division, speaking through Beadle, C.J. (Quenet, J.P., and Macdonald,

228. A similar application in the Madzimbamuto case had been rejected earlier by the Appellate Division: one of the five judges refusing leave to appeal (Fieldsend A.J.A.) founded his refusal on the narrow ground that the matter was not within S. 71(5) through which alone appeal to the Privy Council could be lodged under the 1961 Constitution. The remainder of the court (Beadle, C.J., Quenet, J.P., and MacDonald, J.A., and Jarvis, A.J.A., additionally to the narrow ground mentioned, also founded their refusal on the controversial ground that any decision of the Privy Council would be a mere brutum fulmen (1968 (2) S.A. 457, at pp. 462F, 462H, 464A, and 464B).

J.A., concurring), dismissed the first application on the same grounds as the application for leave to appeal had been refused in the Madzimbamuto case.²²⁹ The second, alternative, application for an extension of the temporary interdict was refused in prose that bespoke of a resignation to reality:²³⁰

In ordinary circumstances, a Court will, as a matter of course, grant an interdict staying the carrying out of a death sentence where the appellant wishes to appeal, and the prospect of the appellant succeeding in that appeal is not a matter which is likely to weigh much with the Court. The circumstances in this case, however, are not ordinary and the issue here is not what chance the applicants have of succeeding in their appeal to the Privy Council - assuming the Privy Council were to hear the appeal - but what benefit they will derive if they are successful in their appeals. It is explicit in the judgment of this Court²³¹ in the application for a declaration under sub-section (5) of section 71 of the 1961 Constitution that it is satisfied that no judgment of the Judicial Committee of the Privy Council would be of any value inside this territory. If that were not so, the present applicants would have been entitled to the declaration asked for in the earlier application.²³².....After the most careful consideration.....I am finally satisfied that an appeal to the Privy Council would be of no value to them because, notwithstanding any judgment the Privy Council might give, it would be wholly ineffective in this country as it would not prevent the execution

229. 1968 (2) S.A. 457.

230. 1968 (2) S.A. 464, pp. 465-6.

231. The refusal of leave to appeal in the Madzimbamuto case : 1968 (2) S.A. 457.

232. The application for a declaration order that they had a right of appeal to the Privy Council.

of the applicants, if the present Government in the exercise of its prerogative decided they should be executed..... In these circumstances, to give the applicants the order for which they ask would only raise their hopes when there is no cause for hope. Far from being an order for the benefit of the applicants, such an order by increasing the delay would only be an act of gratuitous cruelty. ²³³

In the third decision²³⁴ of the case (the final stage) the commutation granted to the condemned men by the Queen was refused recognition on the ground that the prerogative of mercy had been removed from the Crown in right of the United Kingdom to the Crown in right of Southern Rhodesia under S. 49 of the 1961 Constitution whose enactment, although by Order in Council, was in fact authorised under an Act of Parliament of the United Kingdom - the Southern Rhodesia Act, 1961. The Chief Justice asserted that the prerogative of mercy enjoyed by the Crown in right of the United Kingdom over Southern Rhodesia had thus, in 1961, been superseded by statute, and could no longer be exercised in 1968.²³⁵

233. The emphasis is mine.

234. 1968 (2) S.A. 467.

235. 1968 (2) S.A. 467, p. 468A. It is intriguing that the learned Chief Justice should, at this very late stage of his judicial pronouncements, suddenly become so sentimentally sanctimonious about the power and efficacy of a United Kingdom Act of Parliament. A less disingenuous approach would have been a declaration that the commutation was invalid because the United Kingdom Government lacked the naked power to have it enforced: this would have achieved a parity of powerless resignation, with which the Appellate Division's earlier refusals to allow appeals to the Privy Council was informed, for all the court's decisions.

It is now proposed to examine the case of R. v. Ndhlovu and Others.²³⁶ The accused were convicted under a section which had been introduced as an amendment to the Law and Order (Maintenance) Act (Southern Rhodesia). The section was inserted by Act 50 of 1967. The accused contended that the amendment was void because the Legislature of Southern Rhodesia had been dissolved under S. 3 of the Southern Rhodesia (Constitution) Order in Council. The contention would have had to be upheld if the Privy Council's decision in the Madzimbamuto case was binding on the High Court of Southern Rhodesia, because the Board had decided that the Order in Council had full legal effect in Southern Rhodesia. But their Lordships of the Appellate Division held that they were not so bound. Beadle, C.J.'s decision not to regard the Privy Council's decision as binding is made clear in the following excerpt from his judgment:²³⁷

A Judge can only carry on serving now in the situation in which he finds himself. In that situation he is compelled to make the prediction whether the British Government will succeed in regaining control of the Government of Rhodesia. In present circumstances he can only predict that the British Government will not succeed in doing so. This being so, there is no escape from the view that the 1961 Constitution has now been annulled by the efficacy of the change, and from this it follows that the Courts must now take cognisance of the fact that the present Government is the only lawful Government of Rhodesia and that the 1965

236. 1968 (4) S.A. 515.

237. 1968 (2) S.A. 515, p. 535.

Constitution is the only lawful Constitution.²³⁸

Quenet, J.P., had nothing of substance to add to what he had said earlier in the substantive decision on Madzimbamuto's case. In the latter he had already held that the usurping government was the country's de jure government. He could not logically have further enhanced its status in the instant decision, and he wisely did not attempt to do so. Essentially, he only reiterated the position he had adopted in the earlier case.²³⁹

The third and last judge in the case - Macdonald, J.A., besides a few rhetorical flourishes which need not engage our attention, in substance affirmed what he had pronounced in the substantive decision of the Madzimbamuto case: that the usurping government was the country's de jure government.²⁴⁰

This decision concluded the important series of judicial pronouncements upon the legal consequences of the constitutional breakdown precipitated by the Unilateral Declaration of Independence in Southern Rhodesia.

238. Beadle, C.J. now regarded the usurping government as the de jure government in Rhodesia. In the Madzimbamuto case (1968 (2) S.A. 284) he had regarded it merely as a de facto government.

239. 1968 (4) S.A. 515, pp. 542-3.

240. 1968 (4) S.A. 515, p. 554A.

CHAPTER 8

A CRITIQUE OF THE JUDICIAL RESPONSE

(1) LORD PEARCE'S DISSENT

Of all the judgments pertaining to the Unilateral Declaration of Independence by the usurping Government in Southern Rhodesia, that of Lord Pearce in the Privy Council in Madzimbamuto v. Lardner-Burke¹ is the most interesting. It is for this reason that this Critique begins with a commentary on his judgment. There are two issues on which it is proposed to join issue with the learned and noble lord: the importance he appeared to attribute to the Governor's message² in elevating it to a source of authority for the acts of the usurping government; and his exposition of that series of cases in the United States Supreme Court precipitated by, but litigated only in the aftermath of, the American Civil War (April 12, 1861-April 26, 1865).

Lord Pearce used the Governor's message as the keystone of his assertion that the acts of the usurping Government, insofar as these were directed to the preservation of the fabric of society in Southern Rhodesia, were APPROVED³

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1. [1969] 1 A.C. 645, pp. 731-745.
 2. The message which the Governor, Sir Humphrey Gibbs, issued on the day of U.D.I. and which he substantially repeated three days later. Sir Humphrey was the lawful Governor under the 1961 Constitution.
 3. My emphasis. See [1969] 1 A.C. 645, p. 737 F.

by the lawful Government, i.e. the Government of the United Kingdom. Let us examine the two messages of the Governor both of which were quoted by Lord Pearce.

The first read:⁴

I call on the citizens of Rhodesia⁵ to refrain from all acts which would further the objectives of the illegal authorities. Subject to that, it is the duty of all citizens to maintain law and order in this country and to carry on with their normal tasks. This applies equally to the judiciary⁶, the armed services, the police and the public service.

The second read:⁷

I have been asked by Mr. Smith to resign my office as Governor. I hold my office at the pleasure of Her Majesty the Queen, and I will only resign if asked by Her Majesty to do so. Her Majesty has asked me to continue in office and I therefore remain your legal Governor and THE LAWFULLY CONSTITUTED AUTHORITY IN RHODESIA.⁸ It is my sincere hope that lawfully constituted Government will be restored in this country at the earliest possible moment, and in the meantime I stress the necessity for all people to remain calm and to assist the armed services and the police to continue to maintain law and order.

The significance of these two messages (regarded as one message because of their similarity) was expounded by Lord Pearce thus:⁹

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4. This message was issued from Government House on November 11, 1965.
 5. It was careless of the Governor not to have given Southern Rhodesia its proper, legal name and, equally inadvertently no doubt, called it under the name preferred by the usurping Government.
 6. My emphasis.
 7. Quoted by Lord Pearce on p. 738B of his judgment.
 8. Lord Pearce wrote these words in italics.
 9. [1969] 1 A.C. 645, p. 739.

I do not think one should countenance the argument that the message has no force in law. When a government in a crisis of dire peril and difficulty gives a directive to its distressed and anxious citizens through its lawful Governor (claiming, as above, to be 'the lawfully constituted authority in Rhodesia') it speaks with a voice that must be relied on by them as the voice of authority. And when for years, though able to speak, it has not sought to correct or countermand its message, it can be taken that there was no mistake in the message and that it still stands.

Lord Pearce asserted that the Governor's message must stand as the voice of the lawful Government because the latter had never corrected or countermanded it. With respect, could the reason for this not have been that, in view of the provisions of the Southern Rhodesia Act, 1965, and the Southern Rhodesia Order (1965), an express correction to, or limitation of, the Governor's message by the United Kingdom Government was considered logically superfluous? Was not the latter entitled to assume that when it spoke with the voice of an Act of Parliament no one would doubt the identity of that voice, nor be misled into suggesting that the voice of its loyal Colonial Governor was more authentic or resonant than its own? The United Kingdom Government and Parliament would not be a little surprised to learn that they, "though able to speak", had "for years" left their loyal Governor's message as the keystone of Southern Rhodesia's constitutional structure, and that the Governor's message, because it had exhorted the judiciary to carry on with its normal tasks, "must be relied on" as "the voice of authority" that prescribed obedience to the laws of

a government deriving its authority from a Constitution,¹⁰ the establishment of which was expressly prohibited by an Order in Council¹¹, under the authority of an Act of Parliament. Even if, in the unprecedented circumstances, the Governor's message, in open violation of his executive function, was to be treated as a law, surely it was not such a law that could prevail over an Act of Parliament passed by a government the authority of which it was the undisputed intention of the loyal Governor to defend, as was made abundantly clear in the message itself. It cannot be doubted that the Governor himself would have been amazed if he were to learn that the issue of the validity of the usurping Government's laws and acts should have been resolved with reference to the content of his message, and not that of the Sovereign whose servant, in his message, he was careful to stress that he was. The combined effect of the Act and Order was to render all Acts of the usurping Government illegal. The Governor's message was an exhortation to all citizens in Southern Rhodesia to do what was legal. There is therefore no conceivable discrepancy between the two directives. When the Governor asked the people to pursue their normal tasks he could not, in a message prompted by a profession of loyalty, have enjoined on them a duty to ignore the wishes of the lawful authority -

10. The "1965" Constitution.

11. S.2(1), Southern Rhodesia Constitution Order (1965 No. 1952) provides: "It is hereby declared for the avoidance of doubt that any instrument made or other act done in purported promulgation of any Constitution for Southern Rhodesia except as authorised by Act of Parliament is void and of no effect."

the United Kingdom Government. But even if, contrary to what must have been the loyal Governor's obvious intention, he had intended his message to be of paramount authority, such an attitude would have been manifestly untenable. The directive or message embodied in the Act and Order was uncompromising: it was therefore incorrect for Lord Pearce to have imputed to the United Kingdom Government a spirit of compromise in regard to the usurping government.¹²

It is now proposed to turn to Lord Pearce's exposition of the cases before the Supreme Court of the United States which were supposed to have illustrated the principle of "necessity or implied mandate".¹³

The first authority cited by Lord Pearce was Texas v. White.¹⁴ The dictum, and obiter dictum it was, in that case was that acts which would normally come under private law, would be valid under an unlawful government if these same acts could have been done under a lawful government. Only acts in furtherance or support of rebellion would be invalid. Before the outbreak of the Civil War, bonds issued by the Government of Texas could only be issued to holders with the permission of the State

12. The expression used by Lord Pearce was "an uneasy compromise" - see p. 737C of his judgment.

13. [1969] 1 A.C. 645, p. 733A.

14. 74 U.S. 700 (1868).

Governor. In the course of the rebellion the rebel legislature of Texas repealed this law and allowed a military board to issue them. The defendant who had bought these bonds from the board in exchange for a supply of medicine was, after the War, sued for their return by the State of Texas which claimed that his possession of them was illegal because it did not have the consent of the lawful Governor. The defendant riposted that the rebel government, in control of the state government at the time, had dispensed with this requirement. The Supreme Court, having said that the validity of certain acts by a rebel government could be conceded to the latter if they did not further the rebellion, was posed the question of whether a supply of medicine to the rebel military board was an act in furtherance of rebellion. The Court found that because the military board was ^{set} ~~not~~ up to further the rebellion, all its acts were void, and that the repeal of the requirement of the Governor's consent to the transfer of bonds was to facilitate the work of the military board, and was consequently void. The fact that the defendant supplied medicine, which could have been used for civilians in hospitals, could not expunge the illegality inherent in the military board that transferred the bonds to the defendant. The Supreme Court is thus seen to have offered very restricted scope to the operation of the doctrine of necessity, and to have given a very wide purview to the concept of furthering the rebellion. In quoting the wide dictum of this case, Lord Pearce did not appear to advert to its very narrow ratio

decidendi. If the supply of much needed medicine was regarded as inadequately pressing to warrant its approval, would not a case of preventive detention have had even less likelihood of success before the Supreme Court? Reading the dictum without the ratio decidendi, as a mere perusal of Lord Pearce's judgment might lead to, one would form the impression that the doctrine was both extensive and established.

The second of these cases cited by Lord Pearce (again only the obiter dictum was mentioned) was Horn v. Lockhart.¹⁵ In this case an executor in a rebel state had sold the property of an estate and had invested the money - in confederate currency - in Confederate Government bonds. After the War the legatees asked for an account, and distribution, of their money. The executor pleaded that a probate court of the then rebel state (Alabama) had approved of the investment. The Supreme Court of the United States¹⁶ again propounded the doctrine of necessity or implied mandate (neither expression was, however, used) in apparently wide terms, excepting the usual acts intended to, or having the effect of, furthering the rebellion. The question before the court was whether an investment of Confederate money in Confederate bonds in a Confederate State was an act in furtherance of the rebellion. The Supreme Court replied in the affirmative. It maintained

15. 84 U.S. 570 (1873).

16. Unless otherwise indicated, the expression "Supreme Court" shall refer to the Supreme Court of the United States.

that this was a contribution to the resources of the Confederate government and therefore it was void as an act in furtherance of the rebellion. Consistently with this construction of the expression "furtherance of rebellion" a contract of sale between two Rhodesian tobacco companies would be void because the sale would result in revenue for the unlawful government. If the Supreme Court would have struck down a transaction of this nature, surely it would not have permitted preventive detention which would enable the illegal government to suppress opposition and to secure its survival? If this would have been the response of the Supreme Court which decided Horn v. Lockhart, as from its decision it can be surmised it would have, surely Lord Pearce should have said so, and then he could have extended the doctrine had he still decided to do so, but this time drawing attention to the fact that he was consciously extending the doctrine, and not merely adopting it in the narrow form in which it was regarded by the court from whose decision he seeks to extract support for his own thesis.

The third and last American decision to which Lord Pearce resorted to support the existence of a doctrine of necessity or implied mandate was Baldy v. Hunter.¹⁷ In this case the Supreme Court of the United States decided, on the doctrine of necessity or implied mandate (again neither expression was used by the court¹⁸) to uphold an

17. 171 U.S. 388 (1898).

18. The names do not matter if the essence is the same. However, in an earlier Chapter on Nigeria (Chapter 4) it was suggested by the present writer that the doctrine of necessity could not be a doctrine of implied mandate. The assertion was repeated in Chapter 6, in regard to the use of the expression by Grotius.

investment of Confederate money in Confederate bonds by a guardian. To the ward's claim for an account in legal tender after the War, the Supreme Court held that the guardian could plead the investment of the money in Confederate bonds. This case is difficult to reconcile with the earlier Supreme Court decision of Horn v. Lockhart, which, paradoxically, the Supreme Court in Baldy v. Hunter cited with approval. But even Baldy v. Hunter is not authority for the proposition that it is not an act in furtherance of rebellion to detain citizens without trial. The case made out by Lord Pearce from the American cases is therefore not as powerful as perusal of his judgment might suggest. It is submitted that Lord Pearce should have boldly proclaimed that the doctrine of necessity was, when invoked, a Grundnorm in itself, dedicated to the security and advancement of the state, irrespective of whether such advancement should also happen to result in a furtherance of rebellion. The kernel of the doctrine of necessity is the protection of the fabric of society, not the restoration of the lawful sovereign.

(2) LORD REID (FOR THE MAJORITY)

The second judgment it is proposed to assess is that of the majority of their Lordships in the Privy Council, delivered by Lord Reid, in Madzimbamuto v. Lardner-Burke.¹⁹

19. [1969] 1 A.C. 645, pp. 710-731.

Lord Reid, it will be recalled, posed three questions the answers to which he thought to be decisive of the case before the Board:²⁰

- (1) What was the legal effect in Southern Rhodesia of the Southern Rhodesia Act, 1965, and the Order in Council which accompanied it? (2) Can the usurping government now in control in Southern Rhodesia be regarded for any purpose as a lawful government? (3) If not, to what extent, if at all, are the courts of Southern Rhodesia entitled to recognise or give effect to its legislative or administrative acts?

In answering the first question, Lord Reid did not even once advert to the event of U.D.I.²¹ It must be confessed that this fundamental omission is not a little perplexing. If Lord Reid had at least mentioned the fact of U.D.I. in his answer to the first question, and had only then proceeded to dismiss it as irrelevant, his action would still have been understandable. But it is doing less than justice to the case before him to have assessed the constitutional position in the light of facts which do not include the fact of U.D.I. and the consequent acts of the usurping government. The answer Lord Reid gave to his first question engraves the impression that he was speaking as if the government of Mr. Ian Smith were a legal government

20. [1969] 1 A.C. 645, p. 721.

21. Except when mentioning it in passing in regard to its effect on the convention of non-interference undertaken by the United Kingdom Government in 1961. It is interesting to notice that Lord Reid only mentioned, in his answer to the first question, the effect U.D.I. had on the convention and not, and one would have thought this ought to have been the crux of the matter, its effect on the authority of the United Kingdom Parliament to legislate for Southern Rhodesia.

under the 1961 Constitution which constitution had not in any way been impugned, or even attemptedly impugned, that, in short, there had not even been an attempt at rebellion; that he was considering the position of the effect of the Southern Rhodesia Act, 1965, and the accompanying Order in Council, in Southern Rhodesia as if no one had even attempted to impugn the 1961 Constitution, as distinct from saying that such an attempt was not relevant to the effect of the Act and Order, in question. When Lord Reid's first question is read without the answer he gave to it one assumes that the question in fact is: What was the legal effect of the Act and Order in a Southern Rhodesia that had undergone U.D.I. and its consequential events? But, on perusing Lord Reid's answer, one has to confine Lord Reid's question thus: What was the legal effect of the Act and Order in a Southern Rhodesia where there never was an attempted rebellion at all? Therefore, Lord Reid was able to feel free to answer his first question as if the only possible obstacle to the efficacy of the Act and Order was the convention expounded by the United Kingdom Government in 1961 that it would not legislate on matters within the competence of the Southern Rhodesia Legislature without the consent of the Southern Rhodesia Government, the Act and Order not having received such consent.²² This obstacle is ethereal indeed when measured against what the obstacle ought to have been recognised as

22. [1969] 1 A.C. 645, pp. 722-3.

being, namely, the event of U.D.I. and its consequences. Having, through an inexplicable, indeed unexplained, criterion of assessment, identified the obstacle to the efficacy of the Act and Order as the convention rather than the rebellion, Lord Reid was able to clear this hurdle without excessive exertion. His removal of this obstacle was effected in the words following:²³

It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid. It may be that it would have been thought, before 1965, that it would be unconstitutional to disregard this convention. But it may also be that the Unilateral Declaration of Independence released the United Kingdom from any obligation to observe the convention. Their Lordships in declaring the law are not concerned with these matters.²⁴ They are only concerned with the legal powers of Parliament.

The significance of the passage quoted lies in its implication, which is jurisprudentially precarious, that were it not for the existence of the convention there would have been no conceivable obstacle, not to say insuperable obstacle, to the efficacy or legality of the Southern

23. [1969] 1 A.C. 645, p. 723.

24. The underlining is mine. Ought their Lordships at least have concerned themselves with the matter of the rebellion, having discussed and dismissed the legal efficacy of the convention? Surely "in declaring the law" their Lordships ought to have concerned themselves with that matter without which their Lordships would not have had occasion to be asked to declare the law.

Rhodesia Act and Order, 1965, and this, notwithstanding the supervention of the event of U.D.I. It is submitted that the answer to the first question, resting as it did on the fundamental but fallacious assumption that the only conceivable obstacle to the efficacy of the Act and Order was the convention, is completely beside the point which, it is reiterated, was whether the Act and Order could enjoy efficacy in Southern Rhodesia, or legal effect over that territory, after the attempted assumption of power by the usurping government. Any answer that did not relate the legal effect of the Act and Order to the situation as affected by the event of U.D.I. to which the Act and Order were meant to be the specific legal response, would constitute a mere irrelevancy.

It is proposed to turn now to the second question posed by Lord Reid, the latter having answered his first by maintaining that the Act and Order had full legal effect in Southern Rhodesia. The second question was whether the usurping government of Mr. Ian Smith could be regarded for any purpose as a lawful government. Lord Reid began by dismissing the concepts of de facto and de jure governments because such terms were not appropriate to a municipal court attempting to decide which was the lawful government in the territory where it sat because this would mean that the court would have to acknowledge two sovereigns within its own territory, namely the de facto and the de jure governments. A court sitting in a particular territory could and must decide there was only one lawful government

within that territory.²⁵ Lord Reid, however, was prepared to acknowledge the fact that lawful governments could owe their origins to revolutions.²⁶ He proceeded to distinguish such cases from the position prevailing in Southern Rhodesia at the time. He cited two examples of where lawful governments were introduced by revolutions: that of Pakistan in 1958²⁷ and that of Uganda in 1966.²⁸ But in accepting the judicial decisions that confirmed the lawfulness of these governments, his Lordship employed difficult language:²⁹

Their Lordships would not accept all the reasoning in these judgments but they see no reason to disagree with the results.

The sentence is difficult because there was, in both Dosso and Matovu, only one theme or basis of reasoning: that a revolution that is efficacious is to be recognised by the courts as introducing a lawful government. It is difficult to see how one could disagree with this and yet "see no

25. [1969] 1 A.C. 645, p. 724A and B.

26. Ibid. p. 724-5.

27. State v. Dosso (1958) 2 P.S.C.R. 180; now, after fourteen years, overruled in Asma Jilani v. The Government of the Punjab and Another: P.L.D. 1972 S.C. 139. This decision not only overruled Dosso by saying that the Grundnorm was not changed by the military revolution in 1958, but went so far as to imply that there could only be one universal Grundnorm, and therefore none relating specifically to Pakistan alone, which was immutable: *ibid.* p. 182.

28. (1966) E.A. 514. (Uganda v. Commissioner of Prisons, Ex Parte Matovu.)

29. [1969] 1 A.C. 645, p. 725C.

reason to disagree with the results." This difficulty is not helped by their Lordships' omission to clarify precisely what in those two decisions they were unable to agree with. Lord Reid distinguished these two cases on the ground that there the revolutionary governments had been well established whereas in Southern Rhodesia there were still two rivals contending for power, namely, the United Kingdom Government and the usurping government. This process of reasoning led Lord Reid to answer his second question thus:³⁰

If the legitimate Government had been driven out but was trying to regain control it would be impossible to hold that the usurper who is in control is the lawful ruler, because that would mean that by striving to assert its lawful right the ousted legitimate Government was opposing the lawful ruler.

In their Lordships' judgment that is the present position in Southern Rhodesia. The British Government acting for the lawful Sovereign is taking steps to regain control and it is impossible to predict with certainty whether or not it will succeed..... Their Lordships are therefore of opinion that the usurping Government now in control of Southern Rhodesia cannot be regarded as a lawful government.

The third question asked by Lord Reid, was whether and if so, to what extent, the courts in Southern Rhodesia were entitled to recognise the legislative or administrative acts of the usurping government. Since, to Lord Reid who had just pronounced the usurping government to be unlawful for all purposes, the doctrine of necessity was the

30. Ibid. p. 725.

only conceivable way of validating the laws of an unlawful government, Lord Reid addressed himself to the applicability of this doctrine, deciding against it in these words:³¹

It may be that there is a general principle, depending on implied mandate from the lawful Sovereign, which recognises the need to preserve law and order in territory controlled by a usurper. But it is unnecessary to decide that question because no such principle could override the legal right of the Parliament of the United Kingdom to make such laws as it may think proper for territory under the Sovereignty of Her Majesty in the Parliament of the United Kingdom. Parliament did pass the Southern Rhodesia Act, 1965, and thereby authorise the Southern Rhodesia (Constitution) Order in Council, 1965. There is no legal vacuum in Southern Rhodesia. Apart from the provisions of this legislation and its effect upon subsequent 'enactments' the whole of the existing law remains in force. But it is necessary to determine what, on a true construction, is the legal effect of this legislation

The provisions of the Order in Council are drastic and unqualified. With regard to the making of laws for Southern Rhodesia section 3(1)(a) provides that no laws may be made by the Legislature of Southern Rhodesia and no business may be transacted by the Legislative Assembly: then section 3(1)(c) authorises Her Majesty in Council to make laws for the peace, order and good government of Southern Rhodesia: and section 6 declares that any law made in contravention of any prohibition imposed by the Order is void and of no effect. This can only mean that the power to make laws is transferred to Her Majesty in Council with the result that no purported law made by any person or body in Southern Rhodesia can have any legal effect, no matter how necessary that purported law may be for the purpose of preserving law and order or for any other purpose.³² It is for Her Majesty in Council

31. Ibid. p. 729.

32. My own underlining.

to judge whether any new law is required and to enact such new laws as may be thought necessary or desirable.

The central thesis of Lord Reid's majority judgment was that the lawful government in and over Southern Rhodesia was the United Kingdom Government and not that of the illegal regime. This was his answer to the second of his three questions. It is submitted that he should only have asked himself one question: the second. The answers to the first and third were governed by that to the second. Once he had decided that the United Kingdom Government was the lawful government of Southern Rhodesia because the usurping government was not yet so firmly established as to have no rival attempting to regain legal control, he had no choice but to decide that the Southern Rhodesia Act, 1965, and the accompanying Order in Council, had full legal effect in Southern Rhodesia (his answer to the first of his three questions); nor was he left with any alternative but to decide, as between the Act and Order on the one hand, and the doctrine of necessity on the other, that the Act and Order left no legal vacuum in Southern Rhodesia such as would have made the operation of the doctrine of necessity possible.

Since it is seen that Lord Reid's central thesis was that the usurping government was not lawful because it was not yet efficacious, it cannot but be immediately realized that for some not very conspicuous reason he was, in regard to the question of efficacy, partial to the lawful government, in that while he was inexorably insistent that

the usurping government had to be free of the rivalry of the lawful government in order for the usurping government to acquire lawful status; he nevertheless saw no incongruity in being so inimitably indulgent towards the evicted lawful government that far from requiring the latter to sustain its lawful status by continuing to have no rivals, such, for instance, as usurping governments, he merely prescribed that the lawfulness of the lawful government was to survive even though the latter had lost control of the territory in question, so long as such loss could not be demonstrated to the point of certainty to be one that was irretrievable. This partiality calls for justification, no measure of which, however, is discernible in the judgment of the learned and noble lord.

(3) SOME ASPECTS OF THE JUDGMENTS OF BEADLE, C.J., AND QUENET, J.P., IN MADZIMBAMUTO v. LARDNER-BURKE 33

(i) The Theory of Divided Sovereignty

Both Beadle, C.J., and Quenet, J.P. supported the notion of divided sovereignty. They maintained that because sovereignty could be divided, and because the 1961 Constitution had conferred on Southern Rhodesia almost complete internal autonomy, sovereignty in regard to Southern Rhodesia before U.D.I. was apportioned in such a manner that the internal sovereignty belonged to Southern Rhodesia whereas the external sovereignty belonged to the

33. Beadle, C.J.: 1968 (2) S.A. 284, 290-361.
 Quenet, J.P.: 1968 (2) S.A. 284, 361-376.

United Kingdom. Quenet, J.P., as well as Beadle, C.J., cited as their authority for the proposition of the divisibility of sovereignty the famous tome on international law by Oppenheim.³⁴ Their Lordships, however, referred to different pages of this work. Quenet, J.P. referred to pages 118-119, which he did not quote, but an extract from which it is proposed to quote here:³⁵

Sovereignty is supreme authority, an authority which is independent of any other earthly authority. Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all round, within and without the borders of the country.

A State in its normal appearance does possess independence all round, and therefore full sovereignty. Yet there are States in existence which certainly do not possess full sovereignty, and are therefore named not-full sovereign States ...All of them possess supreme authority and independence with regard to a part of the functions of a State, whereas with regard to another part they are under the authority of another State.

Beadle, C.J., referred to page 122 of the work, from which he did not quote, but part of which it is proposed to quote here:³⁶

In view of the somewhat academic nature of the controversy³⁷ surrounding this subject it seems preferable to cling to the facts of life and the practical, though

34. International Law: A Treatise by L. Oppenheim: Longmans, Green & Co. Ltd., London: Eighth Edition (1955); Eighth Impression (1967).

35. Oppenheim, op.cit., pp. 118-119.

36. Oppenheim, op.cit., p. 122.

37. The controversy, namely, as to whether or not sovereignty is divisible.

abnormal and POSSIBLY ILLOGICAL,³⁸
 condition of affairs. As there can be no
 doubt about the fact that there are semi-
 independent States in existence, it may
 well be maintained that sovereignty is
 divisible.

Three points will be raised in respect of the
 passage just quoted. The first is that Oppenheim ack-
 nowledges that there IS a controversy as to sovereignty's
 divisibility, namely, that the position regarding divided
 sovereignty is by no means so well established as to be
 accepted without a respectable body of dissenting opinion.
 The second point is that Oppenheim is constrained to admit
 that the thesis of divided sovereignty is "possibly
 ILLOGICAL"³⁹. The third point is that the last sentence
 in the passage quoted immediately above is tautologous. It
 states that there is divided sovereignty because there are
 semi-independent states, but surely there can only be semi-
 independent states if there is divided sovereignty. Also,
 there is a linguistic difficulty involved. If a territory
 is not independent it is by definition dependent. The
 expression "semi-independent" is just as logically nugatory
 as the phrase "semi-absolute" or "semi-perfect". It is
 therefore submitted that sovereignty is not divisible, and
 that Southern Rhodesia before U.D.I. was not a "semi-
 independent" State.

38. My own capitals.

39. My own emphasis.

(ii) Acquiring a Grundnorm

In the previous Chapter - Chapter 6 - exception was taken by the present writer to the statement of Beadle, C.J., that if the rebellion of the usurping government proved successful, Southern Rhodesia would have "changed" its Grundnorm. The present writer had then objected that the learned Chief Justice ought to have used the word "acquired", because Southern Rhodesia, being a dependent territory and therefore not having a Grundnorm of its own, could only "acquire" a Grundnorm, and not "change" "its"⁴⁰ 'Grundnorm'".

It is best to quote the passage wherein, Beadle, C.J., made the assertion of a "change" of Grundnorm, and thus implied that prior to U.D.I., Southern Rhodesia possessed a Grundnorm of its own:⁴¹

It is as well to start this enquiry by examining the law dealing with the establishment of a new government by a revolutionary process. It may be accepted that a successful revolution which succeeds in replacing the old Grundnorm (or fundamental law) with a new one establishes the revolutionaries as a new *LAWFUL*⁴² government. 'Success' here must be equated with the words 'firmly established' in the definition, because no revolution can be said to have succeeded until the revolutionary government is at least 'firmly established'. Using the word 'succeeded' in this sense the determining factor is whether or not it can be said with sufficient certainty that the revolution has succeeded. If in the instant case the stage is reached

40. My own underlining.

41. 1968 (2) S.A. 284, p. 315.

42. Beadle, C.J., wrote this word in italics.

when it can be said with reasonable certainty that the revolution has succeeded, then in the eyes of international law Rhodesia will have become a de jure independent sovereign state, its⁴³ 'Grundnorm' will have CHANGED⁴⁴ and its new constitution will have become the lawful constitution.

The learned Chief Justice, with unconscious irony, then immediately quoted extracts from the writings of Kelsen to support the proposition of law he had enunciated in the passage quoted directly above. The expression "unconscious irony" is used advisedly, because it is precisely Kelsen's exposition of the Grundnorm that demolishes the Chief Justice's implied proposition that Southern Rhodesia, under the 1961 Constitution and before U.D.I., possessed a Grundnorm of its own which would be "changed" if the rebellion of the usurping government proved successful. The Chief Justice did not even in the remotest fashion indicate the identity of the Rhodesian Grundnorm which the usurping government, if successful, would change. Since no inkling of an impression was offered it may be assumed that if ever there was a "Rhodesian Grundnorm" before U.D.I., it was, for the simple reason that no other is conceivable, the 1961 Constitution as authorised by the Southern Rhodesia (Constitution) Act, 1961, passed by the United Kingdom Parliament. Now, because Kelsen's Basic Norm or Grundnorm is an ultimate norm⁴⁵, the 1961 Constitution would be repudiated by Kelsen as a Grundnorm, for no reason

43. My own underlining.

44. My own emphasis.

45. See Chapter 1 of this thesis.

other than that its authority was not ultimate but derivative of an Act of the United Kingdom Parliament. Beadle, C.J., was thus repudiated by the very authority to which he made such confident appeal.

(4) THE CONTRADICTION IN THE JUDGMENT⁴⁶ OF FIELDSEND, A.J.A.

The contradiction in the learned judge's decision lies in his assertion that a court created in terms of a certain constitution could not give effect to what was not law when judged by the yardstick of that constitution, and his contention that the said constitution, in abnormal circumstances, had to be regarded by the court as having to give way to the doctrine of necessity. To illustrate this contradiction two passages from his judgment will be quoted. The first read:⁴⁷

A court which derives its existence and jurisdiction from a written constitution cannot give effect to anything which is not law when judged by that constitution. To hold otherwise is to abandon a stable anchorage and to set sail into uncharted and, indeed, unchartable seas. The law to be administered by a municipal court is not an abstract concept, determined by general and theoretical jurisprudential principles; it is something concrete determined solely by the set of norms prescribed by the legal order upon which the court considering the case is founded.

The passage above is to be contrasted with the learned judge's volte-face committed in the statement following:⁴⁹

46. 1968 (2) S.A. 284, pp. 422-444.

47. 1968 (2) S.A. 284, p. 432D, E, F.

48. My own underlining.

49. Ibid. pp. 434-435. All the underlining in the passage here quoted is my own.

It appears....that the normal law of the land may, on occasions, have to give way before necessity. This is so in the case of the 1961 Consti-tution.....particularly in a situation where the welfare of the state and its people might be at stake. In a proper case, I think it would be the Court's duty to recognise such a situation and to act upon the principle SALUS POPULI SUPREMA LEX despite the express provisions of the Constitution. Any departure from these express provisions must, however, be fully justified especially where personal liberty is at stake.

Once the principle is admitted of necessity allowing a departure from the express provisions of the Constitution then the precise nature of the necessity and the extent of the departure must depend upon all the circumstances of the case.

It is not proposed even to attempt a reconciliation of two statements, both so clear and rigid, that are diametrically opposed to each other. It remains only to note the failure of the learned judge to accommodate his two statements, each with the other. If the learned judge had been expressly asked to declare for either the 1961 Constitution or the doctrine of necessity, it is suggested he should have declared for the latter. If he had done so he could not but acknowledge the doctrine's authority as that of a Grundnorm, because neither the usurping government nor the United Kingdom Government was prepared to authorise a doctrine of necessity. Therefore if the doctrine was to be invoked at all, it could have been appealed to only as a Grundnorm which, in view of Southern Rhodesia's former dependent status, would have been the territory's first Grundnorm - authorising the performance

and judicial recognition of all acts necessary to preserve and promote the welfare of the territory and its people. The doctrine of necessity, in this situation, would have been the Rhodesian Grundnorm because all Rhodesian law would be traceable ultimately to its authority. The Rhodesian legal order would not have been able to go beyond the doctrine of necessity because it would have been the source of all legal authority within Rhodesia. This Grundnorm would have survived until there ceased to be conformity by and large with its prescriptions, in which case Kelsen would step in to declare that the new Grundnorm was the phenomenon as, for instance, a new efficacious constitution, that supplanted it.

(5) A COMMENTARY ON THE CRITIQUES OF SOME WRITERS WHO HAVE ANALYSED THE JUDICIAL RESPONSE

(A) Are courts to PRESUPPOSE the Grundnorm?

The first writer on whose critique it is proposed to comment is A.J.E. Jaffey.⁵⁰ Jaffey correctly began by stating that because all courts were necessarily integral parts of legal orders, no court could logically pronounce on the validity of its own legal order because it could not confer validity on its own source of authority. He then correctly posed the issue with which the Rhodesian courts were faced, saying:⁵¹

50. "The Rhodesian Constitutional Cases"; by A.J.E. Jaffey: (1968) Rhodesian Law Journal 138.

51. Ibid. p. 142.

What then was the position of a court which after the commencement of the revolution was called upon to determine the lawfulness of the 1965 constitution, or a norm under it, such as an Act of Parliament established by that constitution? According to the 1961 constitution it would be a nullity; it would be lawful only if the 1965 constitution was presupposed to be valid. So the court's determination ought to depend on whether it PRESUPPOSED⁵² the 1961 constitution (or strictly speaking, the Grundnorm from which under the old order that constitution derived its validity) to be lawful, or whether it PRESUPPOSED⁵³ the 1965 constitution to be lawful. Which PRESUPPOSITION⁵⁴ is the court to make?

It is to be noted that Jaffey stressed that the constitutional identity of the court (that is, whether it belonged to the established legal order or to its challenger) was strictly a matter to be determined by the PRESUPPOSITION it made in regard to its Grundnorm. It is to be noted in the quotation below from the same writer that he failed to detect the incongruity he was creating by also suggesting that the court had to make a DECLARATION that it sat under the 1965 Constitution, failing which it was somehow to be presumed to be sitting under the 1961 Constitution. It is a difficult assertion that postulates that a court can only PRESUPPOSE its subordination to Grundnorm X if it so DECLARES its subordination. Surely a court which DECLARES for Grundnorm X by definition no longer merely PRESUPPOSES it. The passage from Jaffey containing this inconsistency reads:⁵⁵

52. My emphasis.

53. My emphasis.

54. My emphasis.

55. Jaffey, op.cit., pp. 144-145.

.....we see that on 11th November 1965 the Rhodesian High Court was the creature of the 1961 constitution which, as long as it remained such, could not uphold the validity of the 1965 constitution or any measure made under it. The members of the court could only hold the 1965 constitution valid by an extra-judicial personal decision to presuppose its validity, thereby becoming the judiciary of the 1965 constitution, completing the revolution and bringing into effective operation for the first time the legal order which the revolution sought to establish. The members of the court however made no such extra-judicial decision. The court continued to sit without any DECLARATION⁵⁶ that it had elected to become the 1965 constitution court. The applicant in the Madzimbamuto case asked in effect for a declaration that a measure made under the 1965 constitution, and that constitution itself, were invalid, and the revolutionary authorities appeared as respondents to contend that the 1965 constitution was the lawful constitution of Rhodesia. By sitting to hear the case at all the court was asserting⁵⁷ or presupposing the validity of the 1961 constitution, and the only decision open to it, it is respectfully submitted, was that any measure not valid according to the 1961 constitution was not valid at all.

It is unfair to the Rhodesian judiciary that it should at first be told that logic forbade it to declare for any Grundnorm because the very fact that it sat as a court

56. My emphasis.

57. My underlining. It is not immediately obvious why Jaffey, after demonstrating with great clarity that no court could assert the validity of, or confer validity on, its own legal order because it could not validate its own source of authority, should now insist that the Rhodesian court was, by remaining silent as to its source of authority, in fact to be presumed to ASSERT the validity of the 1961 Constitution. The writer accentuated his inconsistency by writing "asserting or presupposing" as if these two words, which were contradictory in the context in which they were used, were felicitously synonymous.

meant that it was sitting under a particular Grundnorm and that there was thus no point in its purporting to declare that Grundnorm valid, and then to be advised that if it should fail to declare for what purported to be the new Grundnorm, in fact to do precisely that which was supposed to be forbidden, it would have to be regarded, through this failure to declare, as sitting under the old Grundnorm. It is submitted, however, that the impossible advice offered by Jaffey should be declined, and that the Grundnorm which the court presupposes is to be identified by directing one's attention to what the court does. If the court pronounces in favour of a law valid in regard to Grundnorm X but invalid in regard to what purports to be Grundnorm Y, then the court necessarily presupposes X to be its Grundnorm. In the Madzimbamuto case at the Appellate Division of the High Court, the regulation under which Daniel Madzimbamuto was detained was traceable to the Proclamation of a State of Emergency by the Officer Administering the Government - an office known to the 1965 Constitution but obviously incompatible with the 1961 Constitution. It is true that the regulation was declared void by the court, but this invalidity was pronounced in such a way as to decide that the Officer Administering the Government possessed the authority to issue a Proclamation of State Emergency. Now, surely such a decision⁵⁸ would

58. If, and only if, it had decided that, and nothing more.

logically only be capable of PRESUPPOSING⁵⁹ the validity of the 1965 Constitution. Had the court PRESUPPOSED the validity of the 1961 Constitution it would not, because it could not, even have reached the stage of examining the terms of the relevant regulation because the regulation, irrespective of its terms, would have been void as having been made when there had NOT been a Proclamation of State Emergency known to, or authorised under, the 1961 Constitution since the "Proclamation" under which the "regulation" was made was not issued by the Governor, as it had to be under the 1961 Constitution - as far as the latter constitution was concerned the "Officer Administering the Government" had as much right to issue a Proclamation of State Emergency in Southern Rhodesia as a peasant in Ruritania would have had. The one fundamental fault made by the Rhodesian courts was that they assumed the right to decide between the competing validity of the two constitutions. Had they not done so, they would have been instrumental in illustrating the constitutional phenomenon, no doubt beloved of Kelsen, of judicial presupposition. Thus we realize that the fault of the Rhodesian courts, far from being their failure to declare for the 1965 Constitution resulting in their imputed upholding of the 1961 Constitution

59. This would have been the case if the judges had merely declared that the Officer Administering the Government was authorised to issue a Proclamation of State Emergency, but the judges in fact went further, and thus exceeded their authority, by purporting to assume the right to decide between the two constitutions.

- as Jaffey would contend to be the case, was, on the contrary, their having attempted to assume authority to decide between the validity of the two constitutions, thus exceeding their logical power merely to presuppose one or the other. It is true that the latter view was also expounded by Jaffey but he failed to pursue it, and in relation to the position of the Rhodesian courts, he must be held to have repudiated it by his insistence that the courts, had they wanted to presuppose the 1965 Constitution, should have made a DECLARATION that they were sitting under that Constitution.

(B) How do we decide which laws belong to which Grundnorm?

The next writer whose critique it is proposed to analyse is F.M. Brookfield.⁶⁰ Brookfield appeared to assume that just because a law from a former legal order was applied by the courts the latter were necessarily upholding that legal order and deciding against its "revolutionary competitor". He made the suggestion in the following passage:⁶¹

If it is accepted that there was no principle of law to compel the court to change from acceptance of the pre-revolutionary Grundnorm to acceptance of its revolutionary competitor, then, as long as the court accepted the former, the old order 'by and large' remained effective in that in the eyes of the court the bulk of the law administered depended for its validity on the old Grundnorm.

60. "The Courts, Kelsen and the Rhodesian Revolution"; by F.M. Brookfield: (1969) 19 University of Toronto Law Journal 326.

61. Ibid. p. 345.

Now, the old Grundnorm was the United Kingdom Parliament from which the 1961 Constitution derived its authority. In the post-U.D.I. situation, how could "the bulk of the law administered" have "depended for its validity" on "the old Grundnorm" when the officials involved in the machinery of government were all members of the usurping regime? The fact that these officials - which the 1961 Constitution decidedly did not recognise - were making use of laws which would have been valid under the 1961 Constitution had they been executed by officials authorised under that Constitution, did not mean that a recognition by the court of these laws as applied or executed by these unauthorised officials, was an acceptance by the court of the old Grundnorm, because such an acceptance or, strictly, obedience would have necessitated the court to deny validity to these laws because although the latter were from the 1961 Constitution they were not operated by officials who alone under that Constitution were allowed to operate them. The court does not apply "a law of the 1961 Constitution" if it allows a provision in that Constitution to be made available to those whom the Constitution prescribes it should not avail because of their not being authorised thereunder. It was therefore incorrect of Brookfield to suggest that the old order remained by and large effective because its laws were being recognised by the court, even though those laws were being operated by officials whom the old order would repudiate.

Brookfield then proceeded to make a remarkable suggestion that some measures of the usurping government could be validated by reference to a provision in the 1961 Constitution. He expressed his view thus:⁶²

Where did the Rhodesian judges who, in the revolutionary period between 11 November 1965 and 13 September 1968, held the Smith regime unlawful, find the principle which they variously enunciated by which to judge the validity of the revolutionary measures? In fact the source seems to have been the common law, including in this context the writings of civilians of persuasive authority, which they were authorised to administer under S. 56D of the 1961 Constitution.⁶³

This unexpected interposition can best be refuted by a quotation of S. 56D of the 1961 Constitution itself, which provided:⁶⁴

Subject to the provisions of any law for the time being in force in Southern Rhodesia relating to the application of customary law, the law to be administered by the High Court and by any courts in Southern Rhodesia subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on the tenth day of June 1891, as modified by subsequent legislation⁶⁵ having in Southern Rhodesia the force of law.

The expression "as modified by subsequent legislation" is emphasised above because the Emergency Powers Act passed in Southern Rhodesia in 1960 which was the Act in question before the court, provided that the powers

62. Ibid. p. 346.

63. My underlining.

64. S. 56D of the 1961 Constitution: S.I. 1961 No. 2314, as amended by the Constitution Amendments Act, 1964 (Southern Rhodesia).

65. My underlining.

contained in it were to be exercisable only after a Proclamation of State Emergency had been made by the Governor who, after the 1961 Constitution came into effect, was the Governor under that Constitution. Nothing in S. 56D of the 1961 Constitution would enable the Emergency Powers Act, 1960, to be overridden because that Act took effect as subsequent legislation (i.e., subsequent to 1891). The court, by allowing the powers under that Act to be exercised when there was no Proclamation in terms of the Act itself, was therefore not doing anything that could have been authorised under S. 56D of the 1961 Constitution. The court was, in effect, clearly disregarding the said S. 56D and therefore defying the 1961 Constitution and the Grundnorm from which that Constitution was derived. It is difficult to understand how Brookfield managed to present such an act of defiance as an illustration of compliance. Perhaps this was due to an error in defining what a law belonging to a legal order meant.

(C) Is a judge a law unto himself?

A.M. Honore, in his article "Reflections on Revolutions", was, in regard to a judge's position in a revolution, moved to observe:⁶⁶

Should one not....ask whether some principle of law independent of any particular system authorises a judge, simply by virtue of his office, and irrespective of the source of his jurisdiction, to recognize the revolutionary

66. "Reflections on Revolutions"; by A.M. Honore: 1967 (2). The Irish Jurist 268, pp. 275-6.

régime? Of course this notion of an inter-systematic or supra-systematic law sounds rather startling. It amounts to a resuscitation of 'natural law' or some such dinosaur, and rubs against nearly two centuries of positivism, and (what is more important) constitutionalism, which is part of the political ideology of which positivism is the legal reflection.

.....is there anything inherently absurd about treating the office of a judge as a source of legal authority independent of any particular constitution? The source of his appointment must, no doubt, be constitutional, but cannot the effects of the appointment be supra-constitutional? 67

Honore asked "whether some principle of law..... authorises a judge...to recognize the revolutionary régime?" This principle of law was to be found outside both the old and the new régimes. He saw nothing absurd in a judge being detached from either regime. In fact the very conception of a legal order was anathema to him, for he expostulated:⁶⁸

.....it seems gratuitous to assume that all laws must belong to legal systems. One does not have to be a natural lawyer to ask why laws cannot belong to persons - to Moslems as such, to judges as such etc.

But, with respect, if there were no legal orders there would also be no revolutions against them. The article should, on the premises relied on by Honore himself, have been introduced as "Reflections on the Logical Impossibility of Revolutions, owing to the non-existence of legal orders", and not, as it is in fact entitled,

67. My underlining.

68. Ibid. p. 276. The underlining is mine.

"Reflections on Revolution". Honore sought to discover a solution for revolutions but instead circumvented the issue by denying the existence of the very phenomenon to whose problems he had purported to address himself. One does not prepare for floods or hurricanes by assuming their non-existence. If Honore were to retort that it was never his intention to suggest that there were no legal orders, but only that, within a particular territory, there could be SEVERAL sources of law or legal authority, one of which could be the judge, it may well be riposted that his - Honore's - thesis makes no provision whatsoever for the case where these various sources of authority should come into conflict with one another. Supposing the established legal order (not, on Honore's thesis, the exclusive source of legality as Kelsen would have it) were to conflict with the views of a particular judge. As far as Honore is concerned the judge, being an independent source of authority, could well choose to ignore the provisions of the legal order because although Honore would concede that the judge's appointment would have to be constitutional, that is, in conformity with the provision of the legal order in the territory, his powers were quite another matter: these were exercisable in a manner that was "supra-constitutional" - Honore's own phrase. In short, Honore would insist that a judge appointed under legal order X would not lose his appointment even if the legal order X were to perish. His appointment would then presumably, however paradoxically, be sustained by an UNTRACEABLE power

to survive. If everything created under a legal order could, immediately after creation, assume an existence independent of that legal order under which it was created (and if the judge would, why could not other legal phenomena, e.g., ministers, legislators, civil servants, and policemen), what "order" or "symmetry" or "harmony" or even MEANING, could a legal order have? What, then, would be the point of having a "legal order" at all? Such a phenomenon would be unintelligible if it could not harmonise a multitude of conflicting sources of authority, none of which need submit to the remainder or to any other. It is precisely the pointlessness of having a legal order in these circumstances that forces the conclusion that, in postulating his phenomenon of the non-subordinate judge, Honore was necessarily advocating the abolition of the phenomenon of the legal order by depriving the latter of its essential function, and thus its reason for existence. But in the absence of legal orders the concept of revolutions would be meaningless. In a territory where there were multitudinous legal phenomena none of which was supreme the concept of a "revolution" is absurd because one could not logically rebel if one were in no way subordinate, if, in short, there was nothing to rebel against. If there was not one supreme authority, within which ALL legal phenomena were to be included and HARMONISED with reference to that authority's ultimacy, then the conflict of legal phenomena would make CHAOS the Grundnorm. It is submitted that Honore, by introducing a legal phenomenon outside the legal order,

was making a contribution which, if not declined, would threaten harmony within particular territories because order is an essential attribute of harmony. Even if order is not to be identified with law, it cannot be denied that no philosophy of law so far propounded insists on chaos as its essential ingredient: in that sense order, if not the essence of law itself, is, undeniably, an indispensable attribute of law - even natural law does not have chaos as an ingredient. Honore's thesis, by repudiating the concept of the unified and thus harmonious legal order, and by thus introducing chaos, therefore destroys the concept of law itself, by destroying its essential attribute - order.

(D) Were the Southern Rhodesia Act, 1965, and the accompanying Order-in-Council the correct constitutional response of the United Kingdom Government to U.D.I.?

It is submitted that they undoubtedly were, and the question would not even have been posed had a certain writer not suggested, in company with Macdonald, J.A., that they were not. The writer in question is Alan Wharam.⁶⁹ Wharam saw fit to submit:⁷⁰

69. "Rhodesia and The Crown"; by Alan Wharam: (1969) The Rhodesian Law Journal 21.

70. Ibid. pp. 36-37.
The underlining is mine.

In the view of Macdonald, J.A.,⁷¹ the correct constitutional counterstroke would have been the dismissal of the ministers concerned, the appointment of other ministers in their place and the holding of a parliamentary election; and it is not difficult to think of other courses which could have been taken with equal propriety. What the Crown did, however, was to vest all legal powers in the persons of the Secretary of State and the Governor, leaving the country without any effective lawful administration. The Crown thereby created precisely the same situation as that created by James II on 11th December, 1688; on that occasion, the peers and principal officers of the army established a government to maintain order..... In Rhodesia, in the absence of any legal administration, the actual government simply remained in office: the Crown did not even issue a writ of QUO WARRANTO to inquire by what authority the Rhodesian ministers were exercising their functions.⁷² I know of no proposition of law under which a people can be deprived of its government merely because a group of ministers commit an unlawful act. The action of the Crown appears to have constituted a clear breach of the Coronation Oath and to have been in itself strong evidence of an intention to abdicate.

The passage quoted above is one of the most remarkable pieces of legal writing that the present writer has encountered.

The first point to note is that if "the Crown" - presumably the United Kingdom Government was meant, or possibly even the Governor of Southern Rhodesia - had had the power not only to appoint an alternative Rhodesian Cabinet but

71. Wharam made it clear that it was a view that evoked his approval.

72. The reason why the Crown did not take such a step is by no means altogether impalpable: the lawful Governor had only just dismissed the Rhodesian Ministers on instructions from the Crown. The Crown, if not Alan Wharam, knew quite clearly what it had done.

also to force a general election, it would first have arrested the members of the rebelling Cabinet. The fact that it did not do so is overwhelming proof that it enjoyed no physical powers of coercion within the territory. So, Wharam's support of Macdonald, J.A.'s suggestion was founded otherwise than logically. Wharam went on to insist that it was "not difficult" for the Crown to think of "other courses" on parity of propriety with Macdonald, J.A.'s "constitutional counterstroke". It is not insignificant, however, that although other courses were "not difficult" to think of, Wharam himself did not offer us a single example of these "other courses" - no doubt because these were too simple and obvious to warrant either clarification or illustration.

The second point of interest is Wharam's calm assertion that because the Crown had failed to provide Southern Rhodesia with an effective lawful administration it rendered identical the situation in Southern Rhodesia in 1965 with that in Great Britain in 1688 when King James II fled the Realm. For King James II it was a simple case of flight. He did not attempt to make any constitutional response. The United Kingdom Government, on the other hand, had immediately responded with legislation and the dismissal of the rebelling Cabinet. The United Kingdom Government introduced legislation only five days after U.D.I., at which stage it was by no means clear that the rebellion would inevitably succeed if the United Kingdom were just to rely on legislation and sanctions against the economy of the rebelling

government. Wharam then proceeded to say that in the absence of a legal administration the "actual" government "simply" "remained in office". It might perhaps not be extravagant to ask how a dismissed cabinet could have REMAINED in office, and to have done so as a matter of course ("simply"). It would have been more accurate to say that the government of the country was effectively usurped by the illegal government - to have stressed the element of illegal force majeure, rather than to have suggested the possibility of the constitutionality of the rebelling Cabinet remaining in power.

The third point to be made is that Wharam regarded the lack of physical coercion, in regard to the rebelling Cabinet, on the part of the United Kingdom Government in that the latter failed to reinstate a lawful administration, as a deprivation of lawful government, inflicted on the people of Southern Rhodesia, by the United Kingdom Government - "the Crown". The word "deprive" is inapt because the United Kingdom Government could hardly have confirmed the rebelling Cabinet in office. The latter's dismissal followed by the United Kingdom's inability to impose a lawful administration in the country should not be described as conduct depriving a people of its Government, but merely as an unfortunate consequence of the rebellion of the Cabinet. The language of Wharam was completely misleading in that it suggested that the people in Southern Rhodesia were being penalised as a reprisal for the rebellion of the country's Cabinet.

The final point it is proposed to raise is Wharam's absurd suggestion that what the Crown did constituted "a clear breach of the Coronation Oath" and was "strong evidence" of an "intention to abdicate".

The relevant part of the Coronation Oath reads:⁷³

To govern the people of the United Kingdom of Great Britain and Northern Ireland, and the dominions thereto belonging, according to the statutes in Parliament agreed on and the laws and customs of the same .

Wharam did not specify of which part of the Coronation Oath the Crown was supposed to be in "clear breach". Perhaps it was the opening words "to govern" and the absence of a lawful administration in Southern Rhodesia was a breach of the oath to govern. But the argument is patently fanciful.

(E) Is a written constitution exhaustive of a territory's laws?

It will be remembered that Fieldsend, A.J.A., had said in the Appellate Division of the High Court that a court created by and deriving its authority from the 1961 Constitution could not recognise the validity of any act which failed to conform with that Constitution, nor submit to the authority of an organ of government unknown to that Constitution. This view has been excoriated in Volume 4

73. Halsbury's Laws (Third Edition); Vol. 7; para. 435, page 208.

(1968) of the Annual Survey of Commonwealth Law, by J.M. Finnis.⁷⁴ On the opinion of that learned judge, Finnis finds this to say:⁷⁵

Now there is no doubt that this approach must be very attractive to any lawyer. It has the appeal of logic and purity. The limits of positive rules of law are not transgressed; the courts get their authority from, and find their place in, a system of positive norms and of institutions established by those norms. The system stands or falls as a whole. It is held together by the Constitution.....Now the trouble with constitutionalism is that it is self-defeating.⁷⁶ Fieldsend, A.J.A.'s maxim, 'A court which derives its existence and jurisdiction from a written constitution cannot give effect to anything which is not law when judged by that constitution,' is unfortunately not a maxim which can be derived from, and applied in any particular instance simply by reference to the constitution alone. Usually a constitution will be quite silent on this sort of question. (And why should the written or unwritten character of the constitution fundamentally affect the matter?) But even if a written constitution happened to contain a rule in the form of the maxim just quoted, there would remain the question whether a given court derived its existence and jurisdiction from the written constitution alone:⁷⁷ and that is a question which cannot be answered by the written constitution alone, whatever it may ASSERT.⁷⁸ It might be objected: 'Could not a constitution specifically provide that no rule or person shall be of, or have, any authority otherwise than by virtue of the constitution?' But there would then remain the question whether acceptance of one part of,

74. J.M. Finnis; Annual Survey of Commonwealth Law (1968), Vol. 4, p. 109.

75. Ibid. p. 109.

76. My own emphasis.

77. Where the judiciary is constituted by a written constitution, which is not uncommon, and which was certainly the case under the 1961 Constitution, there cannot logically be any room left to accommodate such a query.

78. Finnis's own emphasis.

or acceptance of authority under, a constitution requires one to accept the whole constitution, including the part which demands that the whole be accepted. Even if a constitution stipulates, so to speak, 'All from me or nothing from me', it cannot prevent anybody from raising the question whether he need accept THAT⁷⁹ norm or statement - and even to raise the question shows that the answer logically cannot be determined by ANY⁸⁰ positive rule of the system, including any rule asserting that the question is illegitimate.

It will be perceived that Finnis impugns the necessity of the court yielding exclusive obedience to a constitution from which the court, whose obedience is demanded, derives its authority. Finnis appears to expound the proposition that acceptance by the court of authority from the constitution, amounting as it does only to a partial recognition of the constitution, does not inexorably impel that court to a recognition of that constitution in its totality, even when the latter demands total acceptance as a condition precedent to the vesting of authority in the court. In other words where the authority offered by the constitution is X minus Y (the latter representing the court's demanded subordination to the constitution) Finnis would maintain that the court is entitled to accept more than what is being offered, namely X without Y being subtracted from it. X represents what the power of the court would have been had Y not appeared in the constitution to reduce it. Finnis's error lies in the fact that he regards X as the authority given by the constitution to the court, and Y merely as a separate constitutional

79. Finnis's own emphasis.

80. Finnis's own emphasis.

phenomenon assigned by the constitution to limit the court's authority. In short, it regards X as the court's actual authority which need not be diminished, indeed cannot be diminished, by what the constitution designs for that end. The answer to this fallacy is that the constitution does not seek to diminish or otherwise qualify the actual power of the court but merely imposes limitations upon what that power would have been. To what arcane canon of construction can the court appeal to sustain its claim to what the constitution would have offered, as distinct from what the constitution has actually offered? Finnis propounds that no constitution is free to say 'Take what I offer or take nothing from me at all'. But why is a constitution to be denied the right to insist on such a choice? Alternatively, and more pointedly, the court cannot choose (the notion of choice being introduced by Finnis) because it is axiomatic that no creature of a constitution can possess more attributes, including the power of choosing or refusing choice, than those with which it is endowed or of which it is made. But Finnis may advance the objection that the persons who are to be the personnel of the court are not creatures of the constitution, and THEY need not, and cannot be made to, choose in the manner stipulated by the constitution. But the limited power of the court is exercisable only by the personnel of the court, and even then only in their capacity as such personnel. Therefore, the personnel of the court, in that capacity or when acting as such, are creatures of the constitution and

as such are constitutionally incapable of questioning their limited power, since it is precisely because of their limited power not having included the power to pose such a question that it becomes impossible for them to pose the question - namely, whether they need accept the constitution in its totality. When those personnel are acting otherwise than as personnel of the court, i.e. when they are not acting as creatures of the constitution, they can have no possible locus standi to question the right of the constitution to provide for the subordination of the court when ex hypothesi the court itself has accepted, because it has not been endowed with the capacity to reject, its subordinate role in the legal system or body politic.

After having delivered himself of the onslaught on the decision of Fieldsend, A.J.A., Finnis then expended his expertise on supporting the famous distinction created by Professor H.L.A. Hart between Primary Rules of Law and Secondary Rules of Law, with the latter comprising, among other Rules, the Rule of Recognition - a criterion against which purported laws are to be tested for their validity. Finnis offers this theory as a better alternative to the reasoning adopted by Fieldsend, A.J.A. He expresses his support for Professor Hart's proposition in the following argument:⁸¹

But why should it not be the case that, during and after a revolution, judges have a genuinely lawful authority to determine, in a lawyerlike and principled

81. Annual Survey, op.cit., p. 112.

fashion, what is, and what is to be, the principle or rule of recognition on which a sufficiently systematic body of rules of change⁸² (legislation) can be reconstructed to deal with the necessities of the common good?⁸³ They have this authority because it was bestowed on them by law,⁸⁴ and because nothing need have occurred which, in a sound jurisprudence,⁸⁵ need be deemed to have divested them of it. To pick and choose among rules of recognition does not divest them of that authority;⁸⁶ in common law jurisdictions a principled picking and choosing among substantive or primary rules of law - on the basis of equity, public policy, justice and the common good - is a recognised judicial function.

It is proposed to take exception to the assertion made by Finnis, immediately above, that for the courts "to pick and choose among rules of recognition does not divest them of that authority". Now, by "that authority" is meant, in Finnis's own words, "authority to determine.....the principle of rule of recognition on which a sufficiently

82. "The rules of change" are another sub-division of Professor Hart's Secondary Rules of Law.

83. The emphasis is mine.
With respect to the Survey, this suggestion seems to be lumping together Professor Hart's secondary rule of change with not only the concept of a de facto government but with, astounding in the light of its attack on the approach of Fieldsend, A.J.A., the doctrine of state necessity as well.

84. My underlining.
It may be asked, "what law"?

85. An extraordinarily ethereal basis for a legal proposition. Could nothing more convincing have been offered? The underlining is my own.

86. My own emphasis.

systematic body of rules of change (legislation) can be reconstructed", in other words, authority to introduce and enforce legislation otherwise than in conformity with the procedures previously laid down to change or make laws. It is significant at this stage not to permit the obscuring of the fact that nowhere in his thesis does Professor Hart assert that those entrusted with the implementation of the rules of recognition (presumptively the courts) are ALSO to be entitled to alter or abolish or create the rules of change, i.e. the procedures accepted to govern the manner in which the existing law is to be changed. But even if one were to assume in Finnis's favour, in contradiction to Professor Hart's thesis, that the courts are entitled to implement the rules of change, this assumption would still NOT entitle the courts to change the law in a manner inconsonant with the procedures stipulated by the rules of change. Furthermore Finnis also endows the courts with the authority not only to implement the rules of recognition, but also to determine what they should prescribe. Again, it is vital to notice that Professor Hart does not suggest, however remotely, that the courts, or those vested with the duty of implementing the rules of recognition, are entitled to choose among, or to change, rules of recognition otherwise than in strict conformity with the rules of change which the courts are powerless to alter otherwise than as authorised by the latter rules themselves, if at all. Where a revolution or a revolutionary situation occurs the changes forcibly brought about are not made in accordance with the

pre-existing rules of change and cannot be recognised by the pre-existing rules of recognition. The old system therefore breaks down, in terms of Professor Hart's thesis, and the legal order has to be constituted afresh. The thesis of primary and secondary rules does not, and was never intended to, provide a formula to the courts in mediis rebus to authorise them to decide what is law and what is not, nor to decide which purported government is the lawful government in the country.

The following extract from Professor Hart's book, The Concept of Law, makes it clear that his thesis, especially with reference to the rules of recognition of which Finnis made such extensive use, is nothing more than a rationalisation of an effective legal order and cannot be construed as offering to the courts in a country embroiled in a revolution a canon of judicial response. The extract reads:⁸⁷

The simplest form of remedy for the UNCERTAINTY⁸⁸ of the regime of primary rules is the introduction of what we shall call a 'rule of recognition'. This will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts. The existence of such a rule of recognition may take any of a huge variety of forms, simple or complex. It may, as in the early law of many societies, be no more

87. The Concept of Law, by H.L.A. Hart, O.U.P., 1961, pp. 92-93.

88. Professor Hart's emphasis.

than that an authoritative list or text of the rules is to be found in a written document or carved on some public monument what is crucial is the acknowledgement of reference to the writing or inscription as AUTHORITATIVE⁸⁹, i.e. the PROPER⁹⁰ way of disposing of doubts as to the existence of the rule.... where more than one of such general characteristics are treated as identifying criteria, provision may be made⁹¹ for their possible conflict by their arrangement in an order of superiority, as by the common subordination of custom or precedent to statute, the latter being a 'superior source' of law.

Just as Professor Hart contemplates a Paramount Rule of Recognition, so does he envisage a Paramount Rule of Change. It is submitted that Professor Hart's Paramount Rules of Change and Recognition are together analogous to Professor Kelsen's Grundnorm, and that as a revolution can change either otherwise than in obedience to the dictates of the concept concerned, courts under the old order can turn to neither for assistance in a revolutionary situation.

(F) Is there any difference between Dias and Kelsen?

The next thesis is propounded by Dias. The learned author supports the view that the Grundnorm is not applicable in all cases where laws are to be assessed for validity because in a revolutionary situation, where one Grundnorm has been overthrown, laws have to be tested against a

89. Professor Hart's emphasis.

90. Professor Hart's emphasis.

91. Obviously such provision must be made in accordance with the rules of change and cannot logically be made by those entrusted with the mere implementation of the rules of recognition.

criterion other than the Grundnorm, and this non-Grundnorm criterion is any legal yardstick which the courts choose to adopt. The learned author presents his case against the all round applicability of the Grundnorm thus:⁹²

.....the identification of 'laws'. In normal conditions propositions have the quality through some medium acknowledged by courts as capable of impressing them with that stamp. Such medium is the Grundnorm, or some subordinate medium derived from it. When there is as yet no accepted Grundnorm, as in the midst of a revolution, the courts may nonetheless accept as 'laws' propositions identified with reference to whatever criterion they choose; which is precisely what happened in the Grundnorm Case. 93

With respect to the learned author, Professor Kelsen defines the grundnorm as the source of validity of the laws of a legal system. If the courts adopt a criterion of validity by which they inexorably abide, then by the very function which that criterion is created to perform, the said criterion becomes the new, if temporary, Grundnorm. It is surprising how those who criticize the usefulness of the Grundnorm usually propose the substitution of concepts disconcertingly difficult to distinguish from the concept they object to. It seems as a matter of juristic logic that there must always be a paramount authority: whether it be called a Grundnorm, a distinctive quality, a supreme attribute, a paramount criterion, an

92. (1968) C.L.J. 233, pp. 253-4.

93. The emphasis is mine. The "Grundnorm Case" is of course Madzimbamuto v. Lardner-Burke.

ultimate source of authority, seems, as is submitted to be, decidedly unimportant. If authority is logically traceable to X (yet another variation?) then X is the supreme law: its substance is not changed by having it proclaimed unostentatiously as a rule to identify whether or not given phenomena are law. There is either law or there is no law: but where there is law (and this is required by the universally accepted conclusive presumption against the existence of a legal vacuum) there must be a source of authority, call it what one chooses.

PART IV : CONCLUSIONCHAPTER 9CONCLUDING CRITIQUE(1) THE ROLE OF THE JUDGES

It has been observed why the many attempts at defining the correct approach to be adopted by the judiciary in the midst of a constitutional imbroglio have ultimately proved to be untenable, owing to profound misconceptions regarding the constitutional nature of the judiciary in a legal order. All the judges in situations commonly denominated as "constitutional breakdowns" have, it is submitted, made the fundamental error of assuming that their jurisdiction within a legal order extended to their having authority to pronounce upon the validity of that legal order, of which they are but a constituent. It has been noticed that such a jurisdiction is logically indefensible owing to the simple but crucial fact that because the judiciary, being a constituent of the legal order¹, can only come into being AT THE MOMENT WHEN the legal order is established, it is conceptually inapt to suggest that the judiciary, being CONTEMPORANEOUS

1. The judiciary cannot, of course, be OUTSIDE the legal order. If judges can be outside the legal order so too can other members of society, in which case the term "legal order" becomes unintelligible. Furthermore, if judges were outside the legal order, what then would be the link between the judiciary and the legal order? Once it is accepted that within a particular territory there can only be ONE legal order, it becomes inconceivable that any phenomenon in that territory can have any legal attributes if that phenomenon should happen to be OUTSIDE that legal order.

with, since it is able only to exist WITHIN, the legal order, can, no matter how violently incongruously, also be ANTECEDENT to the legal order in that it - the judiciary - is able to exist prior to, and hence independently of, the establishment of the legal order and only THEN proceed to decide on the validity of the legal order. In the light of this opinion all suggestions of judges being confronted, during a constitutional imbroglio, with a "dilemma" of having to "decide" which legal order to offer their "allegiance" to, of judges having to make "a personal choice" or "a political decision" whether to "remain loyal" or to "join the revolution", become juristically unintelligible. If legal order X is in existence, then all those "judges" who ARE judges must belong to it and to no other legal order. (It is no gainsay to suggest that in a revolutionary situation there might not be a legal order. If there is no legal order in the territory concerned, there will not be any judges either.) The fact that some of these judges may personally prefer to belong to a past or potential legal order Y is juristically meaningless because what is by definition non-judicial can hardly be relevant to the purpose or function of the judiciary. Therefore, to call a personal, non-judicial, preference a judicial dilemma is a manifest error. Again, if legal order X is in existence there can be no question of the judges of that legal order "deciding" to owe "allegiance" either to another existing legal order (i.e. that of a foreign country) or to a past or potential legal order,

because a creature of legal order X is constitutionally incapable of performing any act which that legal order does not empower. A judge is NOT a biological being who is vested with judicial authority: he, or perhaps rather "it", is the judicial authority itself. His biological non-judicial will, as distinct from his judicial will, has no possible relevance to the judicial function. A "judge" who decides to "remain loyal" to a legal order that is no more is, therefore, NOT a judge, because the conduct known as "remaining loyal" is not a norm of the new legal order. If the "judge" who decides to "remain loyal" to the former legal order by either asserting its existence or "resigning" from his office, is not a judge, then what he does has no relevance to any analysis of the judicial function in any constitutional situation. Conversely, a judge can never "join" a revolution because such a proposition involves the assertion that, within one legal order, there can be, in addition to that legal order, a normative item (the judge) that is outside that legal order initially, but which is nonetheless able, juristically, to insert itself into the legal order it has decided to "join". It is submitted, however, that when a biological being passes from the cognition of one legal order as a judicial entity of that legal order to the cognition by another legal order as a judicial entity of the latter legal order, the process of transmutation should not be described as that of a judge "joining" a revolutionary legal order, but as that of the CREATION of a judicial entity by the legal order - established by successful revolution - which the

"judge" has "joined". The "judge" cannot be a judge of the legal order he proposes to "join" because if he is already a judge of that legal order he can hardly "join" it. But if he is not a judge of the legal order he proposes to "join" he is, as far as that legal order is concerned - and within the relevant territory THIS legal order alone is the appropriate subject of juristic cognisance - NOT a judge within it. Therefore, the statement that a "judge" has "joined" a revolutionary legal order is meaningless in terms of that legal order because no being is a judicial entity thereof unless he has been CREATED thereunder.

When describing phenomena in relation to a specific legal order the use of terminology that enjoys no meaning within its four corners is inappropriate, and in the present context this entails that those acts of human volition that are biological only, should not be introduced into the exposition of the judicial phenomenon.

Having now surmounted a frequent and fundamental misconception we can now approach the remaining problems of the phenomenon known conventionally as "constitutional breakdown" with an enhanced measure of confidence.

(2) PROBLEMS OF DEFINITION(a) "Constitutional Breakdown"

The term "Constitutional Breakdown" appears never to have been defined, despite its frequent use in the vocabulary of constitutional law. It is proposed to exclude from the ambit of this term political upheaval or instability that is not of a kind that destroys the authority of the national legal order. Hence a state of public emergency or even a condition of endemic ferment in respect of which the legal order is able to make provision does not constitute a constitutional breakdown because the constitution (which represents the source of law in the legal order), being able to respond in the manner aforesaid, cannot, as a matter of logic, be described as having broken down. The constitution can only be described as having broken down when there exist conditions or circumstances of so momentous a nature that its inability to make provision in relation thereto can only mean that it has ceased to function.

When a constitution breaks down it can either leave a legal vacuum or be replaced by another constitution. If it leaves a legal vacuum the situation by definition becomes one into which legal discussion cannot enter. If it is replaced by another constitution then the new constitution becomes the new source of law.²

2. The constitution as the source of law for a legal order will be discussed later.

It is constitutionally irrelevant whether the constitutional breakdown is unavoidable (as in the case of the military coup in Nigeria in January, 1966) or deliberately brought about (as in the case of Sri Lanka, formerly Ceylon, when its "Constituent Assembly" - an institution unknown to ANY of the country's constitutions³ - purported to adopt the Republican Constitution of May, 1972; the method of introduction being one NOT authorised by the country's previous Dominion Constitution of 1946, so that the latter, being no longer in a position to make provision for the new situation, lapsed into a breakdown).

(b) "The Grundnorm" and "The Constitution"

What is the Grundnorm of a legal order? Is it the same as the constitution of that legal order or is it different from it? Since the Grundnorm is a concept propounded by Hans Kelsen, a quotation from him at this point should not be out of place. Kelsen states:⁴

If we ask why the constitution is valid, perhaps we come upon an older constitution. Ultimately we reach some constitution that is the first historically⁵ and that was laid

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3. Namely, neither the 1946 Constitution nor the prospective 1972 Constitution.
 4. General Theory of Law and State: Hans Kelsen: translated by Anders Wedberg: (1945) Reissued (1961) by Russell and Russell (New York): at page 115.
 5. It is important to note here that Kelsen does NOT mean the country's first constitution, but the earliest constitution to which the authority of the present constitution can be traced. Therefore, if the present constitution has emerged from a clean break of authority with all past constitutions, it will be this present constitution that represents the country's historically first constitution.

down by an individual usurper or by some kind of assembly. The VALIDITY OF⁶ this first constitution is the last presupposition, the final postulate, upon which the validity of all the norms of our legal order depends..... That the first constitution is a binding legal norm is presupposed, and the formulation of the presupposition is the basic norm of this legal order.

The passage above shows unmistakably that the Grundnorm is not to be identified with the first constitution but with the VALIDITY of that constitution. If the Grundnorm represents only one aspect of a constitution, what are the latter's other aspects? Before this question is answered, it is proposed that the word "constitution" should here be confined to the historically first constitution. Kelsen's distinction between the historically first constitution and those constitutions that are not historically first merely makes the point that the Grundnorm resides in the former only, and never in the latter. It is submitted, therefore, that in the interests of clarity the term "constitution" should be confined to a constitution that is ultimate, and that a constitution that is not ultimate, namely, one that does NOT contain the Grundnorm, should not be referred to as a constitution at all.

6. My emphasis to point out that the Grundnorm is merely that constituent aspect of the constitution that represents the latter's validity, AND NOTHING MORE. In view of the confusion that perennially plagues the Grundnorm, it is imperative to labour the point that the Grundnorm, "the last presupposition", "the final postulate", is NOT the historically first constitution as a whole, but only the VALIDITY THEREOF. Also, the historically first constitution is conceptually different from OTHER constitutions - Kelsen makes this very clear.

It is suggested that a constitution, in the sense of the word indicated above, possesses TWO constituent aspects:

(1) Its validity.

(2) Its content.

Of what does a constitution's validity - the Grundnorm - consist? It consists of the hierarchical, normative rationalisation of the purely factual CONGRUENCE between the CONTENT of the constitution, and the CONDUCT of society⁷ in general. The rationalisation aforesaid is essential to the existence of a legal order because it converts what is otherwise a mere factual congruence between a congeries of propositions (the content of the constitution) and a congeries of conduct into a system of COMPLIANCE whereby the conduct is understood to COMPLY with the content of the constitution. But what is the content of the constitution? The content of the constitution consists of those propositions⁸ that are initially present in the constitution, AND those propositions that have been introduced subsequently but in strict congruence

7. The term here is used to denote people inhabiting a particular territory - all other possible connotations are disavowed.

8. The propositions are merely LINGUISTIC propositions or propositions PER SE: in themselves they have no non-linguistic property of any kind. This applies even if they are actually phrased in imperative language.

with that proposition which refers to⁹ the introduction aforesaid such that the introduction can be rationalised, or converted, into COMPLIANCE with the proposition that refers to the said introduction.¹⁰ However, where the content of the constitution does not have a proposition that refers to change, the content of the constitution is restricted to the propositions the constitution possesses initially.¹¹

The point has now arrived when the question must be asked: what is meant by "hierarchical, normative rationalisation"¹²? The expression means that where the content of the constitution mentions¹³ a series of bodies or persons in a hierarchical order, each such body or person being said to tell the person or body being placed immediately below it what to do and what not to do, AND this turns out to

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9. The use of the non-imperative expression "refers to" is deliberate because the content of the constitution - i.e. the propositions embodied therein - is NOT regulatory in any sense. The regulatory property comes from the constitution's VALIDITY: it does not come from the constitution's CONTENT. Therefore, the proposition that REFERS TO change is totally different from H.L.A. Hart's RULE of change.
 10. This is conventionally known as the procedure for constitutional amendment.
 11. This would be the position of an absolutely rigid constitution that contains no amendment procedure whatsoever.
 12. The expression is my own. However, the IDEA it embodies is, it is submitted, that of Kelsen.
 13. The use of the non-regulatory "mentions" is again deliberate and essential, if consistency is to be maintained in the assertion that the regulatory property can only come from the VALIDITY of the constitution.

be what is IN FACT being done (hence achieving congruence between content and conduct), this CONGRUENCE can be rationalised to signify that the body or person immediately below behaves congruently with what the body or person immediately above tells him to do, BECAUSE he, the lower body or person, OUGHT to do what he has been thus told. The link, before rationalisation, between the CONTENT of the Constitution and the CONDUCT of society congruent therewith was merely one of factual CONGRUENCE. The link, after rationalisation, becomes the OUGHT. Before rationalisation, if A states that B is to travel to Y, and B in fact does so, there is merely congruence between the statement of A and the conduct of B. After rationalisation, B does what A says BECAUSE B's conduct CONSTITUTES the OUGHT, because B COMPLIES¹⁴ with A's statement. The hierarchy of normative rationalisation PLUS the congruence¹⁵ that is thus

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14. The distinction between Congruence and Compliance is NOT the same as that made by H.L.A. Hart between "being obliged" and "having an obligation" (Hart: *Concept of Law*: O.U.P.: 1961: at pp. 80-81). The distinction proffered by Hart, based as it is on attributing to the verb a meaning different from that of the noun of the same word, is of highly elusive import. Why should "being obliged" be devoid of the element of moral compulsion that Hart asserts is embodied in "obligation"? Is there any moral distinction between surrendering money to a gangster, and surrendering money to an opprobriously extortionate government? The existence of law should not depend upon the absence of moral revulsion in the rules of law.
15. This is, of course, the congruence between the non-imperative content of the constitution and the conduct of society in general. The congruence need only be by and large, not absolute. Absolute congruence is only possible in mathematics.

rationalised constitute the hierarchy of norms. But the hierarchy of norms is NOT in itself the entire legal order. The hierarchy of norms is only PART of the legal order. The legal order must have MATERIAL as well as NORMATIVE content. Therefore, it is only the hierarchy of Norms PLUS the content of the Constitution that comprise the legal order.¹⁶

Having reached this stage it ought to be asked: what is the difference between the Constitution and the Legal Order? The answer is that there is absolutely NO difference between the two terms. The Constitution IS the Legal Order. Conventional constitutional terminology so frequently associates the term "Constitution" with a sort of fundamental legal DOCUMENT that it is difficult to realize what a grave error this association of ideas is. The DOCUMENT, conventionally referred to as the "Constitution" is nothing more than the LINGUISTIC expression of the Legal Order. It is NOT a constituent phenomenon of the Legal Order. Conceptually, there is no conceivable distinction between a

16. The present writer therefore dissents from Kelsen's view that the hierarchy of norms IS the legal order. Kelsen gives the legal order NORMATIVE content only: the present writer would give it both NORMATIVE and MATERIAL content. Furthermore, Kelsen's OUGHT is only an imperative and does not include the action taken in response to it. But the present writer's OUGHT is CONGRUENT CONDUCT PLUS the rationalisation of that conduct: the present writer's OUGHT is therefore not a mere directive, but is RATIONALISED CONGRUENCE - CONGRUENT RESPONSE. The present writer's "OUGHT" is thus seen to be a RATIONALISED "IS".

Legal Order that has been LINGUISTICALLY manifested and one that has not been so manifested.

An essential question in this discussion is: what is the "OUGHT" that converts congruence into compliance? A learned writer has endeavoured to assert that the "OUGHT" is merely a MORAL maxim. Thus the writer (Professor Graham Hughes) maintains:¹⁷

The prescriptions of the constitution¹⁸ are statements concerning ordered societal living. Assertions that we OUGHT¹⁹ to comply with the constitution must be supported by argument drawn from social fact and moral principles. There is no other realm of meaning in which such statements can operate, and the notion of the validity of basic norms must in the end either be devoid of meaning or be a moral maxim.

But if Professor Hughes is right, it will mean that law IS morality. But Professor Hughes is NOT right. The "OUGHT" in this context is not a moral obligation. Indeed, IT IS NOT AN OBLIGATION²⁰ AT ALL. It is CONGRUENT RESPONSE. It is a NON-IMPERATIVE. For example, B does what A says simply because B RESPONDS to A's statement. Whether B RESPONDS to A's statement out of fear, agreement, moral approbation,

17. Validity and the Basic Norm: in Essays in Honour of Hans Kelsen (1971); California Law Review, Inc.; at page 705.

18. "The prescriptions of the constitution" are, of course, the constitution itself, "prescriptions" being the combination of the two constituent aspects of the constitution - the VALIDITY and the CONTENT of the constitution.

19. The word is italicised by Hughes.

20. This is logically the case because the word "obligation" cannot, without changing its meaning altogether, be purged of all moral or ethical content.

malice, profit, ethical obligation, etc., is not relevant to the functioning of the legal order. Compliance is therefore CONGRUENT RESPONSE. The hierarchy of normative rationalisation EXPLAINS the factual congruence between the content of the constitution and the conduct of society in general. The LINK between the two congruent phenomena is RESPONSE.²¹

With the utmost respect to Kelsen, without whom it would not have been possible to present the view given above, the concept whereby efficacy is INCLUDED in the phenomenon of VALIDITY is better than his highly unsatisfactory attempt to SEPARATE efficacy from validity. In his attempt to do this Kelsen asserts:²²

In the basic norm the fact of creation and the effectiveness are made the condition of the validity - 'effectiveness' in the sense that it has to be added to the fact of creation, so that neither the legal order as a whole, nor the individual legal norm shall lose their validity. A condition cannot be identical with that which it conditions. Thus, a man, in order to live, must

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21. "Response", Professor Hughes will surely agree, is absolutely free from all notions of ethics or morality. The word "obligation" is inappropriate because it attaches a MOTIVE to the phenomenon of mere CONGRUENT RESPONSE. The expression "is obliged" also embodies a MOTIVE (e.g. the intention to avoid unpleasant consequences on the part of the person obliged), and it is therefore equally inappropriate in any exposition of the legal order. The "OUGHT", it is submitted, should, in the exposition of a legal order, be understood as a NON-IMPERATIVE. Congruent response, or compliance, does NOT result from an obligation of any kind.
22. "Pure Theory of Law": by Hans Kelsen: translated by Max Knight: University of California Press: 1970: at page 212.

have been born; but in order that he remain alive other conditions must also be fulfilled, for example, he must receive nutrition. If this condition is not fulfilled, he will lose his life. But life is neither identical with birth nor with being nourished.

With respect, the analogy of life is less than convincing. Why is the act of birth not a part of life? Is it not somewhat less than logical to assert that the act of birth is a phenomenon EXTRANEIOUS to life? Kelsen asserts that a condition cannot be identical with that which it conditions. But this is logically only true where it is possible, conceptually, for the condition to exist independently of that which is conditioned. Where that which is conditioned can have no existence except WITH that which conditions it, does it not follow that the condition is not a separate phenomenon from that which it "conditions", but that the condition is a CONDITION CONSTITUENT, or simply, a CONSTITUENT of that which is "conditioned"? Birth is surely the starting point of life (in the context of Kelsen's analogy and not, of course, in biology) and NOT something that merely CONDITIONS life. Similarly, the fact that VALIDITY is impossible to conceive of without the element of EFFICACY demonstrates that EFFICACY is a constituent of VALIDITY. In the view of the writer of this thesis the EFFICACY to which Kelsen refers is the CONGRUENCE which the present writer expounds. If the view of the present writer is accepted, it will not be necessary to expend such erudition on the "difference" between efficacy and validity. The present writer, of course, agrees that efficacy is not in

itself validity. It is efficacy PLUS the hierarchical normative rationalisation thereof, the result of which is CONGRUENT RESPONSE, that constitute validity.

Kelsen's error lies in his failure to appreciate that CONGRUENCE is not separate from, but is a constituent of, CONGRUENT RESPONSE. An error in the opposite direction will be made if one is to assert that CONGRUENCE entirely constitutes, or is identical with, CONGRUENT RESPONSE. Such an error has been made by Professor Alf Ross. Professor Ross insists:²³

The fundamental question is the question about the meaning of the statement that a legal norm 'exists', that is, that it is part of the law in force of a certain country. Kelsen rightly declares that this meaning is determined by the method through which its 'existence' is demonstrated, the statement verified. Now, according to Kelsen, the 'existence' of a norm is its 'validity'; and that a norm possesses validity means 'that the individuals ought to behave as the norm stipulates'. This, however, is nothing that can be verified by experience. Kelsen admits that the empirical fact which can be verified through observation and which is decisive for the 'validity' of a norm is the effectiveness of the legal order and nothing else. He tries to save the idea of validity by saying that the existence of a norm is not identical with the social facts of effectiveness, but only *CONDITIONED*²⁴ by these facts by which the 'existence' can be verified. However, when these facts are the necessary and sufficient condition for the 'existence' of the norm, and when the method of verification is determining the meaning of the statement that a norm exists, then the existence of a norm is simply the

23. Ross: (1957) California Law Review 564, at p. 567.

24. The word is italicised by Ross.

effectiveness of the order to which it belongs, and nothing else. The idea of 'validity' is superfluous.

The present writer, while agreeing with Ross that the distinction made by Kelsen between effectiveness and validity is logically indefensible, is not prepared, however, to travel with Ross to the opposite extreme of asserting that EFFECTIVENESS IS VALIDITY. The present writer has shown that EFFECTIVENESS is merely that state of factual CONGRUENCE between the content of the Constitution and the conduct of society in general. The present writer has also shown that in order for this state of mere factual congruence to become VALIDITY (i.e. CONGRUENT RESPONSE) the factual congruence must undergo the process of hierarchical, normative rationalisation. The fact that it is only the state of factual congruence which can be an empirical fact verifiable through physical observation does NOT mean that one is not entitled, through RATIONAL observation, to connect the two masses of congruent phenomena (i.e. the CONTENT of the Constitution and the CONDUCT of society in general) in order to give them MEANING; and the ONLY way to connect these two masses of congruent phenomena is to understand the conduct of society as a RESPONSE to the content of the Constitution. The idea of validity can only be "superfluous" if one is to understand the legal order to be nothing more than two masses of congruent phenomena that are totally devoid of ANY rational link.

(c) "Descriptive" and "Prescriptive"

We have seen that Kelsen speaks of the legal order as prescriptive but regards the science of law as descriptive. Kelsen asserts, and the present writer agrees, that despite their different import BOTH the legal order and the science of law have to be understood in OUGHT propositions. Ross joins issue with this, and maintains that this means that there is NO difference between the legal order and the science of law that is used to understand the legal order. This is how Ross makes his point:²⁵

It is obvious that insofar as the possibility of a science of law is assumed, it is also assumed that it is possible objectively, on the basis of observable facts and according to a method of empirical verification, to state what the law of a certain country is relating to a certain question; e.g., whether any legal consequences are attached to a promise of marriage, or not. This, again, means that the propositions of the science of law are theoretical propositions in the sense of logic - they are either true or false and (not being tautologies) concerned with reality. All this is admitted by Kelsen. Now, this further implies that the propositions of legal science must be IS²⁶ judgments - for what does 'reality' and 'truth' mean but that which can be stated in IS²⁷ - judgments? Or: when it is possible to state what the law of a country IS,²⁸ this statement must necessarily be in the form of an IS²⁹ judgment.

But this is not admitted by Kelsen. According to him the propositions in which the science of law describes its object (the legal norms) are statements in which an 'ought', not an 'is'

25. Ross, op.cit., p. 566.

26. The word is italicised by Ross.

27. The word is italicised by Ross.

28. Ross's emphasis.

29. Ross's emphasis.

is expressed. These statements are by Kelsen called 'rules of law' (a very unhappy terminology!) and possess exactly the same logical structure as the legal norms - they are hypothetical judgments that attach a specific legal consequence to a specific condition, e.g. if a man commits a murder, a certain punishment ought to be inflicted upon him. In this way the PROPOSITIONS OF THE SCIENCE OF LAW ARE LOGICALLY NOT DISCERNIBLE FROM THE LEGAL NORMS THEMSELVES.³⁰ At the same time Kelsen is aware of the fact that the logical meaning of the propositions of the science of law is quite different from that of the legal norms. Therefore, he adds, without any justification in the logical analysis, that the OUGHT³¹ propositions of the science of law are used in a purely descriptive sense, and he denies that they are judgments of value in any possible sense of this term.

With respect, the elaborate erudition of Ross is tarnished by his failure to appreciate the fundamental distinction between the MEANING of X, and the LINGUISTIC EXPRESSION of that MEANING. If the meaning of a phenomenon is the OUGHT, how otherwise can LINGUISTIC expression be given to it than by means of an OUGHT proposition? For example, if A is the linguistic expression of B, and B is the³² OUGHT in the legal order, then, but in the linguistic medium only, A is an OUGHT proposition. But the linguistic medium that expresses B (which linguistic medium is A) is NOT to be confused with B itself. B itself is beyond the linguistic medium in that it can be expressed only, BUT NOT

30. The words have been italicised by Ross.

31. The word is italicised by Ross.

32. The definite article "the" is used to distinguish this "ought" of the legal order from OTHER "oughts".

CONSTITUTED, therein. MEANING is not a linguistic property, although language can be used to express it in linguistic form. The legal order is a MEANING, the science of law is a description of THAT meaning, a LINGUISTIC expression of that meaning. But since the MEANING is the OUGHT, is it not perfectly logical that the LINGUISTIC expression thereof should, and could be nothing other than, an OUGHT proposition? The critique of Ross on this point is therefore unsound.

(d) "Presupposition"

We have hitherto spoken of "presupposition" without elaboration. But the word is alleged to embody an ambiguity that is further suggested to be crucial to the meaning of Kelsen's Grundnorm, in that the latter is supposed to be tenable only if the ambiguity is resolved in favour of one of the two possible meanings of the word. This contention has been advanced by Professor Graham Hughes. The present writer, however, disagrees with Hughes and maintains that the ambiguity suggested does not in fact exist. Hughes expresses his opinion thus:³³

.....to talk of validity itself as a presupposition is dangerously misleading. In any particular legal community the particular basic procedures that people accept are, of course, not presupposed at all, but are, from the internal point of view, simply experienced and, from the external point of view, discovered by

33. Essays in Honour of Hans Kelsen, op.cit., p. 700.

observation. It would, therefore, be correct to say that *THE STATEMENT*³⁴ that a particular norm of the system is valid *PRESUPPOSES*³⁵ that there is a valid (generally accepted)³⁶ basic norm, but it would be misleading to say that *THE VALIDITY OF THE BASIC NORM*³⁷ resides in a presupposition. The difference here is crucial. To say that in speaking of the validity of a particular norm of the system, the validity of the basic norm is presupposed, leaves open the possibility of an independent criterion for verifying the validity of the basic norm.³⁸ But to say that the validity of the basic norm *IS*³⁹ (consists of) a presupposition, apparently excludes it from the category of propositions that may be verified. It is in failing to make this necessary distinction that Kelsen's exposition leads to confusion.

Let us attempt to illustrate this APPARENT distinction, and show its illogicality. When we say "X's dog", we presuppose X. But this does not mean that X is a mere presupposition as distinct from a tangible mortal. X here exists independently of the statement. But when we say

34. The words are italicised by Hughes.

35. The word is italicised by Hughes.

36. The identification of "valid" with "generally accepted" is obviously wrong: it fails to observe the distinction between mere factual congruence ("generally accepted?") and congruent RESPONSE (validity). Furthermore, it is wrong to speak of the Grundnorm as being generally ACCEPTED, because this means that the ACCEPTANCE is PRIOR to the Grundnorm, and that the latter is not ultimate.

37. The words are italicised by Hughes.

38. This "independent criterion" suggested by Hughes is, of course, the ACCEPTANCE of the Grundnorm by the people: see footnote No.34 in this Chapter.

39. The word is italicised by Hughes.

"X is good", we presuppose "goodness". But "goodness" is a mere presupposition and is intangible. "Goodness" here exists only in the presupposition.

Nevertheless, the illustration is unsound - because the distinction is unsound. Irrespective of the nature of that which is presupposed, BOTH statements contain a PRESUPPOSITION: in the first, the presupposition is X; in the second, the presupposition is "goodness".⁴⁰ Whether or not the presupposition is verifiable outside the four corners of the statement is something which the statement itself cannot decide, and therefore IRRELEVANT to the statement. To suggest that a statement that presupposes is not the same as a statement that contains a presupposition is illogical. The distinction should NOT have been made between "a presupposition" and "that which presupposes". The distinction should have been made between "that which presupposes" and "that which IS presupposed". BOTH these meanings are not different from, but are contained WITHIN, the term "presupposition". But if the latter distinction is made, Kelsen cannot be accused of ambiguity because he has always made it perfectly plain that the Grundnorm does NOT presuppose, but IS presupposed. Kelsen never flags in his emphasis that the Grundnorm is ultimate, and that it

40. This attempt to separate "presupposition" from "that which presupposes" is redolent of H.L.A. Hart's valiant but futile effort to separate "being obliged" from "having an obligation".

therefore CANNOT presuppose anything. In the present writer's terminology, the Grundnorm is the CONGRUENT RESPONSE of society in general to the content of the Constitution. The Grundnorm is the MEANING of the legal order beyond which MEANING it is impossible to go. This MEANING presupposes nothing. It is presupposed by the factual congruence between the content of the Constitution and the conduct of society in general.

We have examined the definitions of theoretical concepts. We shall now turn to the task of their application to the situations comprehended in this Thesis.

(3) THE TASK OF APPLICATION

Constitutional breakdown in two countries has been examined in this Thesis. The situations in Nigeria and Southern Rhodesia will now be analysed in turn.

(a) Nigeria

What is the Constitution of Nigeria? The Constitution, as we have seen, consists of two aspects: the VALIDITY and the CONTENT. What is the content of the Constitution of Nigeria? It is that of which Decree No. 1, 1966, is the LINGUISTIC expression. What is the validity of the Constitution of Nigeria? It comprises the hierarchy of normative rationalisation of the factual congruence between the content of the Constitution and the conduct of Nigerian society in general. The CONTENT and VALIDITY

aforesaid is the Constitution of Nigeria. Alternatively, the CONTENT of the Constitution can be called its MATERIAL content, and the VALIDITY of the Constitution the latter's NORMATIVE content.

(b) (Southern) Rhodesia

What was the Constitution of (Southern) Rhodesia in that period with which the Thesis is concerned (i.e., specifically from U.D.T. to the end of the constitutional litigation in R v. Ndhlovu)? The CONTENT of that Constitution was that of which the 1965 Constitution⁴¹ (as a document) was the LINGUISTIC expression. The VALIDITY of that Constitution was the hierarchical, normative rationalisation of the factual congruence between the content of the Constitution and the conduct of (Southern) Rhodesian society in general.

It is thus observed that once the concept of "Constitution" is purged of all extraneous elements (of ethics, morality, etc.) the identification of the Constitution does not require monumental labour.

We have now seen what the Grundnorm is in relation to the Constitution. However, to illustrate how the term "Grundnorm" could be misunderstood, it is proposed to quote from the opinion of a learned writer - J.M. Eekelaar.

41. (Southern) Rhodesia is now governed under the 1969 Constitution, but the period that concerns us - the breakdown - does not include the advent of this Constitution.

Eekelaar writes:⁴²

Where, then, is the Rhodesian grundnorm to be found? There are no officials whose criteria of authority are fully accepted by the court. The answer seems to be that the ultimate criteria of validity remain the provisions of the 1961 Constitution, which continues to live on in a curiously disembodied state, ignored by the men with effective power and suspended in major respects by the de jure authorities who are not, indeed, bound by it. And the very recognition of the 1961 Constitution compelled the court, by reason of the subordinate nature of that Constitution⁴³, to accept the United Kingdom Government and Parliament as the ultimate, de jure law-making authorities. But since these authorities were ineffective, the court was forced to regard those aspects of the Constitution implicitly or explicitly POINTING TO⁴⁴ them⁴⁵ as legitimate as being

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42. (1967) 30 M.L.R. 156, pp. 174-175; "Splitting the Grundnorm" by J.M. Eekelaar. The learned writer was commenting after the Madzimbamuto decision was given by the General Division of the High Court, and before the case was heard in the Appellate Division of the said court. Except where otherwise indicated the emphasis in the passage quoted is mine.
43. It is inconsistent of Eekelaar to submit (a) that the ULTIMATE criteria of validity remain the provisions of the 1961 Constitution, and (b) that the 1961 Constitution is of a SUBORDINATE nature. How, Eekelaar may well be asked, can that which is SUBORDINATE provide ULTIMATE criteria? This careless use of language is difficult to defend.
44. The emphasis is that of Eekelaar who gives the phrase in italics in his article.
45. "them" presumably refers to Eekelaar's understanding of the "de jure authorities" in the immediately previous sentence in the passage.

in a state of suspense.⁴⁶ The court would not give effect to what might be called these 'positive'⁴⁷ aspects of the Constitution. But the other parts of that Consti-⁴⁸tution, which might be termed its 'negative' aspects, which defined the manner and extent of the use of governmental powers against the citizen but which did not in any way DEFINE⁴⁹ the governmental authority, could still be enforced and would be used to restrict the activities of the de facto authorities whether lawful or not. So the position seems to be reached that while a British enactment forbidding certain steps to be taken by the regime would not be enforced by the courts, a provision in the 1961 Constitution which made the same prohibition would be enforced, thus rendering the de facto authorities liable to an action if they proceeded. The only explanation there can be for this situation is that the former prohibition would owe its de jure status to some 'positive' aspect of the 1961 Constitution which referred to the British authority as the proper one to make the prohibition, but which was in suspense, whereas the latter prohibition does not depend on a secondary rule of recognition pointing to an ineffective authority but is itself part and parcel of the original grundnorm. The grundnorm is split⁵⁰, but since its 'positive' side is only suspended and not extinguished, its 'negative' side can still be enforced. This dissection of the grundnorm may take theorists by surprise but cannot be said to be illogical.

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46. How could ANY provision of the 1961 Constitution have avoided "implicitly or explicitly" "POINTING TO" the "de jure law-making authorities"?
47. The emphasis is that of Eekelaar.
48. The emphasis is that of Eekelaar.
49. The emphasis is that of Eekelaar.
50. It has been shown that the Grundnorm is a QUALITY. It is to pose the science of language an impossible task in asking it to SPLIT a QUALITY. A QUANTITY can be SPLIT; but a QUALITY can only be SHARED. Eekelaar confuses "splitting" with "sharing". This QUALITY is, of course, CONGRUENT RESPONSE.

The short answer to this very lengthy passage is that the Grundnorm is VALIDITY - a QUALITY. The Grundnorm is not a bundle of valid rules of law that can be split up merely by dividing the bundle. The Grundnorm is NOT a numerical QUANTITY of legal rules that can be split like a fascicle. Furthermore Bekelaar's legal rules - or "ultimate criteria of validity"⁵¹ (note the PLURAL) - appear to be not interrelated: how otherwise could an acknowledgment of some of them ("the negative aspects") have failed to point to the existence of the discarded remainder ("the positive aspects")?

(4) THE DOCTRINE OF STATE NECESSITY

In Chapter 4 the thesis was tentatively adumbrated of there being three species of the doctrine of necessity⁵² in regard to constitutional cataclysms. It was also noted, however, that each of these species was incompatible conceptually with the remaining two others, so that the validity of any one of them would necessarily invalidate the other two competing species. It was also stated that the present

51. The phrase is that of Bekelaar.

52. Throughout this thesis the terms "doctrine of necessity" and "doctrine of state necessity" are used as interchangeable terms. We are not at all concerned with the doctrine of necessity in PRIVATE law. Furthermore, the terms "OUGHT" and "OUGHT-NESS" are used interchangeably. There is no distinction between "OUGHT" and "OUGHT-NESS" because there is no distinction between X and the ESSENCE OF X.

writer approved of one of the species in preference to the others notwithstanding the fact that the latter had enjoyed the accolade of judicial approbation. The present writer had endeavoured to give a fair rationalisation of the two species from which he dissented, and it is hoped that this aforementioned exposition would not be regarded as indicative of his support for the two species thereof.

The three competing species will now be presented again briefly, in order to show that only one of them is tenable.

(i) Doctrine of State Necessity - Species No. 1.

THE IMPLIED NECESSITY PROVISION

This species of the doctrine states that where a country's constitution fails in its express provisions to deal with certain situations that arise in the country, implied provisions will be understood to have been made in the constitution to cope with the situations that so arise, in order that the country, whose preservation the constitution is presumed to maintain, may be secured against a breakdown in its administration.

The judicial decision that supports this species is The Attorney-General of the Republic v. Mustafa Ibrahim and Others⁵³. In that case the accused had impugned the authority of the Supreme Court of Cyprus to hear their case

53. 1964 Cyprus Law Reports 195.

because, so they contended, that Court had not been constituted under the provisions of the lawful Cyprus Constitution of 1960. The Court had been created because both the Supreme Constitutional Court and the High Court had ceased to function owing to the withdrawal therefrom of the constitutionally prescribed quota of Turkish Cypriot judges. The new Supreme Court was staffed exclusively by Greek Cypriot judges. The Court was purportedly created by the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33 of 1964). This Law was, however, not passed by the Legislature as defined in the 1960 Constitution because it no longer possessed its prescribed quota of Turkish Cypriot legislators. The Supreme Court had thus to discover some criterion of validity for the law which had purported to create it otherwise than in accordance with the express provisions of the 1960 Constitution. In essence the doctrine of necessity permits and prescribes the performance of such acts by such organs of authority as the necessity of the situation warrants. The scope is wide but to narrow it would introduce the very danger it is designed to avoid, namely, the danger of being circumscribed and powerless in time of unforeseen national emergencies.

This was how the first of the three judges in the case justified the conferment of validity on the said Law 33 of 1964 through the doctrine of necessity:⁵⁴

54. Ibid. Vassiliades, J., p. 214.

This Court now, in its all-important and responsible function of transforming legal theory into living law, applied to the facts of daily life for the preservation of the social order⁵⁵, is faced with the question whether the legal doctrine of necessity should or should not, be read IN⁵⁶ the provisions of the written Constitution of the Republic of Cyprus. Our unanimous view, and unhesitating answer to this question, is in the affirmative.

The use of the expression "read IN" in preference to "read INTO" is decisive of the point that the court explicitly intended the doctrine of necessity to function WITHIN the authority of the Constitution. By merely finding the doctrine IN the Constitution the court was doing nothing more, in strict logic, than making a discovery that the Constitution, in an emergency for which its express terms had not made provision, had had the foresight and prudence to embody within itself a doctrine of necessity which, although only implicit, could, if this was necessary for the preservation of the state, in fact override its own express provisions. By studiously avoiding the expression

55. My own underlining.

56. My own emphasis. The use of the word "in" in preference to "into" is NOT an error, but is a deliberate effort to assert that the doctrine of necessity, in the court's view, is not something introduced, imported or injected into the Constitution, but is, on the contrary, a provision ALREADY PRESENT, albeit only implicitly, in the Constitution. Hence it was logical for the court to use the word "in" because it was merely reading off something IN the Constitution, and not introducing an extraneous provision INTO it. The result is that what is done is done under the authority of, and not in contravention of, the Constitution - this authority is not the less real for being merely implicit and intrinsic. (This is a rationalisation of the court's view.)

"read INTO" the court had exhibited exemplary care in demonstrating that the doctrine of necessity was not something from outside that was forcibly pushed into the Constitution to override the clear intention of the latter, and thus to challenge the Constitution's authority, but that the doctrine was something already IN the Constitution, and thus necessarily always a constituent of it, so that it would be illogical to say that its operation was otherwise than in strict accordance with the Constitution. This species of the doctrine of necessity does not in its operation in any way affect the integrity of the Constitution, and thus leaves the authority of the latter intact.

It is proposed to dissent from this interpretation of the doctrine of necessity.⁵⁷ The very idea of a WRITTEN constitution, with a long list of provisions, spelt out with a high degree of explicitness and detail, intending nevertheless to harbour an implicit authorisation to be availed of in an emergency, to override the authority of the provisions it

57. That the court did not intend its interpretation of the doctrine of necessity to challenge the authority of the Constitution is made very clear also in the judgment of the second judge - Triantafyllides, J., at page 234 of the judgment:

"In such a case such steps, provided that they are what is reasonably required in the circumstances, CANNOT be deemed as being repugnant to or inconsistent with the Constitution, because to hold otherwise would amount to the absurd proposition that the Constitution itself ordains the destruction of the State which it has been destined to serve."

(Emphasis supplied.)

had made in specific detail, is difficult to understand. If a constitution had really intended to embody such a doctrine it could have made just another express provision to that effect. The insertion of an additional article would not have been baulked at if the Constitution had really intended to espouse such a doctrine to wreak havoc on its list of express provisions. It is never the function of the court artificially, and using questionable logic, to prolong the life of an improvident Constitution. If a Constitution cannot have secured to its express and detailed provisions the necessary factual compliance, that Constitution is not a reflection of real life, it cannot govern those it designs to govern, and since its existence lies in its function, and since it cannot function, it is logically extinct. If the court's interpretation of the doctrine is pushed to its logical conclusion, it means that a constitution can have ALL its express provisions flouted, and YET function with all its integrity by means of the doctrine of necessity which it is presumed to have implicitly enshrined within itself. This interpretation is untenable.⁵⁸

(ii) Doctrine of State Necessity - Species No.2.

THE THESIS OF CONDOMINIUM

This species of the doctrine states that the doctrine of necessity (i.e. itself) is not part of the constitution of

58. My own interpretation will be given when we come to examine Species No.3 of the doctrine of necessity.

the country, but in situations which that constitution cannot cope with, it, the doctrine, joins, as it were, the constitution in a common endeavour to preserve the order and welfare of the country. The doctrine, although it is not in this case a part of the constitution, is nevertheless not exclusive of the latter's authority because the provisions of the latter can only be overridden by the doctrine when it becomes necessary to do so. Where it is not necessary to override the entire constitution, those provisions overridden by the doctrine will have their field of operation governed by the doctrine, whereas the remaining provisions will continue to function as provisions of the constitution. There is thus a precarious but real condominium constituted of the doctrine (where it is able to operate) and the constitution (in those areas where it is not necessary for the doctrine to intervene).

The judicial decision that propounds this species of the doctrine of necessity is Lakanmi and Ola v. Attorney-General (West).⁵⁹ The facts of this case have been fully set out in Chapter 3. A brief recapitulation will be given here. In January, 1966, the civilian administration in Nigeria instituted under the 1963 Constitution purported to surrender its authority, as distinct from being summarily ejected from it, to a military government which, in the

59. This case was decided in April, 1970, in the Supreme Court of Nigeria. The decision has been analysed in Chapters 3 and 4, and it is proposed to analyse only one of its aspects here. The case is as yet unreported but it is the judgment of the Supreme Court SC. 58/69.

circumstances of an armed revolt by a section of the Nigerian Army, was the only form of government capable of continuing the administration of the country. The military government, whose accession was not authorised under the 1963 Constitution, issued a decree⁶⁰ suspending certain provisions of that Constitution but allowed the remainder to continue to function. The appellants, after much confused legislation, found themselves ultimately in a position where a decree (Decree No. 45, 1968) had purported not only to confiscate his property, but to render the confiscation beyond the purview of the courts. The appellants challenged this decree and inevitably also impugned the authority of that institution that had enacted it - the Federal Military Government. The Supreme Court held that the Federal Military Government was not the paramount authority in Nigeria. That Government had come to power under the authority of the doctrine of necessity. It could remain in power for only so long as it was necessary for it to discharge its caretaker responsibilities. The doctrine of necessity, however, could only override such provisions of the 1963 Constitution as circumstances should warrant: the 1963 Constitution was decidedly not superseded entirely, and continued to function, albeit in an attenuated form. This attenuated form, however, INCLUDED the power of judicial review over all legislation to test their validity against the yardstick of the unsuspended part of the 1963 Constitution. Now, the Fundamental Rights embodied in

60. Decree No. 1, 1966.

that Constitution had been among the provisions allowed to continue under Decree No. 1, 1966, by reference to which decree the Supreme Court defined the powers of the Military Government (it was highly selective in the process). Since the Supreme Court had power to test Decree No. 45, 1968 (the decree of confiscation) against the Fundamental Rights Chapter in the Constitution, and since that decree clearly violated the appellants' right against the confiscation of his property, the appeal was allowed. Thus we witness the doctrine of necessity being interpreted by the court to govern the country hand in hand, as it were, with the 1963 Constitution. The part of the judgment propounding this harmonious partnership is:⁶¹

It was evident that the Government thus formed⁶² is an interim government which would UPHOLD THE CONSTITUTION⁶³ of Nigeria and would only suspend certain sections AS THE NECESSITY ARISES.⁶⁴

This view of the doctrine of necessity is indefensible once it is realized that the supreme authority in a state is a QUALITY and not a QUANTITY. It cannot be split or divided like a bottle of sweets. The view of the court means that even if only one provision of the 1963 Constitution were allowed to function, and the rest of the Constitution were abrogated, that Constitution would still be one of the

61. Lakanmi, op.cit., p. 20.

62. The Federal Military Government.

63. My emphasis. Here the 1963 Constitution governs.

64. My emphasis. Here the doctrine of necessity governs.

two ultimate sources of authority in the country. It must be asserted again that the Grundnorm in a Constitution - its VALIDITY - cannot be split.

(iii) Doctrine of State Necessity - Species No.3

NECESSITY AS A CONSTITUTION IN ITSELF

The present writer would prefer to define the Doctrine of Necessity (the third species⁶⁵) as a constitution in itself: the word "constitution" being understood in its ^{two}~~three~~ constituent aspects, as has been earlier suggested to be its meaning.

The constitution which the doctrine of necessity by its operation contradicts and thus puts out of existence is logically replaced by the doctrine of necessity - the new constitution. But how, it may be asked, does the doctrine of necessity extinguish the life of the former constitution merely by the doctrine's operation? The former constitution - like all constitutions as I understand the term - possessed a Grundnorm, its VALIDITY ASPECT, its "ultimate ought-ness". The doctrine of necessity, by operation⁶⁵ at all, necessarily denies and destroys the ultimacy of this "ultimate ought-ness" because the OUGHT-NESS of the doctrine is NOT in that hierarchy of "ought-ness" which terminates in, and is unified through, the "ultimate ought-ness" of the former constitution. This upsets the

65. That explanation of it supported by the present writer.

hierarchy of "ought-ness"⁶⁶ of the former constitution because, within the same territory, indeed within the same field of operation, there now exists an "ought-ness" that displaces the "ought-ness" of the former constitution. The former constitution becomes the "former" constitution precisely because it is unable to function owing to its inability to resolve the intruding "ought-ness" into its own hierarchy of "ought-ness". Where two species of "ought-ness" conflict, the one that is able to rationalize the factual situation with its hierarchy of "ought-ness" is the new "hierarchy of ought-ness". Now the doctrine of necessity prevents, in the Cyprus and Nigerian situations, the factual congruence with the respective contents of the 1960 Cyprus Constitution and the 1963 Nigerian Constitution⁶⁷, which factual congruence respectively, their hierarchies of "ought-ness" require as material for their function of normative rationalisation. Failing this factual congruence, the respective hierarchies of "ought-ness" in the 1960 Cyprus Constitution and the 1963 Nigerian Constitution would collapse owing to the absence of the factual congruence required for their normative rationalisation. The doctrine of necessity would then have replaced the respective constitutions as the new constitutions of those countries. This does not, of course, mean that the two countries share a common

66. Or the hierarchy of CONGRUENT RESPONSE.

67. To illustrate the point, it is merely ASSUMED, but not asserted, that the doctrine did in fact operate in these two cases.

constitution or even identical constitutions because their CONTENTS would be different (the political and social exigencies being different), and the content is also a constituent aspect of a constitution.

Let us now return to the abstract. It has been submitted that the doctrine of necessity is itself a constitution. How would its two constituent aspects be identified? The first aspect, the Grundnorm, the VALIDITY ASPECT, "the ultimate ought-ness", would be the fact that any act⁶⁸ within the territory not susceptible of normative rationalisation by that hierarchy of "ought-ness" that ends in the "ultimate ought-ness" that is the Grundnorm of the Doctrine of Necessity would be either an illegal or a non-legal act.

The second aspect (the CONTENT) of the "doctrine of necessity" Constitution would be the measures (MINUS their VALIDITY) that are taken in response to the exigencies of time, place and circumstance.

The doctrine of necessity can expire like any other constitution. By the "doctrine of necessity" is meant here the OPERATION of the doctrine and not the IDEA⁶⁹ of it. The doctrine expires when a new constitution with its own hierarchy of "ought-ness" disrupts and thus destroys the

68. This includes any non-act, state of affairs, etc.

69. The killing of a cat does not kill the IDEA of "cat".

hierarchy of "ought-ness" of the "doctrine of necessity" constitution.

This species of the doctrine of necessity has no judicial support, but it is favoured by the present writer because it eliminates the anomaly of a source of law that is "extra-constitutional". The confusion created by this anomalous classification is gratuitous, and emanates from the failure to pursue the implications of the doctrine of necessity to their necessary, logical conclusion. A very recent and translucent example of this failure to pursue the implications of the doctrine of necessity is the decision by the Supreme Court of Pakistan in Asma Jilani v. The Government of the Punjab and Another.⁷⁰

The 1962 Constitution of Pakistan had given the Supreme Court of Pakistan power, inter alia, to enquire into the validity of detention orders. However, on March 25, 1969, the Commander-in-Chief of the Pakistan Army proclaimed Martial Law throughout Pakistan and purported to abrogate the 1962 Constitution. Certain of the provisions of the 1962 Constitution, among them the provisions establishing the judiciary, were, however, retained under the terms of the Proclamation. The Commander-in-Chief also proclaimed himself President⁷¹ and Chief Martial Law Administrator. In Presidential Order No. 3, 1969⁷², the President -

70. P.L.D. 1972 S.C. 139.

71. This was done on March 31, 1969, with retroactive force to March 25, 1969.

72. Jurisdiction of Courts (Removal of Doubts) Order, 1969.

General Yahya Khan - purported to terminate judicial review of martial law regulations. The appellant was detained under one of these regulations. Her appeal was heard AFTER the overthrow of President Yahya Khan.

The Supreme Court decided that as the Presidential Order No. 3, 1969, was in contravention of the 1962 Constitution, the Order was void. However, their Lordships reasoned, if the Order No. 3 was made to avert a major disaster its illegality could be CONDONED⁷³ under the doctrine of necessity, and the Order would then be given effect to. But again the Court failed, as courts in other countries had failed before it, to reconcile the authority of the Constitution with an infringement of that authority by the application of the doctrine of necessity. (The doctrine was not, in fact, applied because the Court found that the Order as well as the Regulation under which the appellant had been detained were not such as could come under the appeal to salus populi suprema lex.) The decision in Asma Jilani is thus another illustration of the judicial misunderstanding of the doctrine of necessity.

73. Asma Jilani, op.cit., p. 207.

(5) CONCLUSION : THE COURTS AND THE GRUNDNORM

It was mentioned in Chapter 7 that the courts could only PRESUPPOSE the Grundnorm, and that it was illogical to suggest that they could in any way confirm its having been established. The courts could no more approve or confirm a Grundnorm than a creature could choose or confirm its creator. The legitimacy of the courts themselves derives from the Grundnorm and just as they suppose their own legitimacy they must presuppose the Grundnorm - the legitimacy of the courts cannot exist without the fact of that existence necessarily presupposing the Grundnorm. The courts, in their conduct, can never "use", "apply", "approve", or "follow" Kelsen's Theory: they can only be the instruments by means of which Kelsen ILLUSTRATES his DESCRIPTIVE thesis. The judges cannot use Kelsen: Kelsen uses them.

That Kelsen means his thesis to be DESCRIPTIVE, and NOT suggestive, prescriptive or even advisory, in relation to the conduct of judges, is made clear in this statement from him:⁷⁴

It is the task of the science of law to represent the law of a community, i.e. the material produced by the legal authority in the law-making procedure, in the form of statements to the effect that "if such and such conditions are fulfilled, then such and such a sanction shall follow."

74. GENERAL THEORY OF LAW AND STATE: HANS KELSEN: TRANSLATED BY ANDERS WEDBERG: (1945), REISSUED (1961) BY RUSSELL AND RUSSELL (NEW YORK), p. 45. The visual emphasis in the passage is mine.

These statements, by means of which the SCIENCE OF LAW represents law, MUST NOT BE CONFUSED WITH the norms created by the law-making authorities. It is preferable not to call these statements norms, but legal rules. The legal norms enacted by the law creating authorities are prescriptive; the rules of law formulated by the science of law are DESCRIPTIVE. It is OF IMPORTANCE that the term 'legal rule', or 'rule of law' be employed here in a DESCRIPTIVE sense.

The passage above stresses as clearly as possible that although Kelsen's Theory is ABOUT norms, the Theory is not ITSELF a norm, and the Theory is, therefore, never "applicable" in any court of law, which court has the function of applying, and can apply nothing else but, legal norms. It is this application of legal norms by the courts that Kelsen DESCRIBES. No court can logically cite Kelsen to support any of its decisions, because Kelsen himself says that the courts can only function in the context of legal norms, and therefore a court which purports to rely on Kelsen's Theory - which is NOT a legal norm - is in fact destroying the very import of the Theory, namely, its DESCRIPTIVENESS.

The question: "What Grundnorm ought a court to prefer?" cannot be understood in terms of any legal norm. The issue which that question raises is outside the hierarchy of norms in a legal order: the issue WHAT to presuppose is outside the field of constitutional theory, if by "WHAT to presuppose" is meant that the court is free to pick and choose what Grundnorm it wants, or what Constitution it prefers. The issue "what to presuppose" is WITHIN the

domain of constitutional theory, if by that is meant that the courts must have SOME source of authority, and that that source of authority is the Grundnorm. The function of legal theory is fulfilled once it has explained that "a" Grundnorm must be identified: it is ultra vires legal theory to go beyond that function to suggest or prescribe the identity of the Grundnorm. The process of identification is essential: identity in itself⁷⁵ is irrelevant.

Is it not, however, possible for the judges to presuppose an inefficacious "Grundnorm", a "wrong Grundnorm"? It is submitted that such a contingency is a logical impossibility. If the "judges" should purport to presuppose an inefficacious "Grundnorm", the people who purport to be the "judges" are not judges at all. They can only be judges if they happen to presuppose what qualifies to be a Grundnorm. There cannot be any "judges" if there is no Grundnorm to confer validity on the appointment of the personnel who purport to be judges. If X, which the "judges" "presuppose", is NOT the Grundnorm, then X cannot create any judicial appointments, and the "judges" will logically NOT be judges.

75. It is thus irrelevant to constitutional theory whether country A has Grundnorm X or Y: it is satisfied once country A has a Grundnorm, be that X or Y. The same applies to the identity of country A's Constitution: once country A has a Constitution it matters not what the identity of that Constitution is.

Is the presupposition of the Grundnorm made by the judges a legal norm in itself? The answer is Yes. If the presupposition were not a legal norm in itself, the judges would not be competent constitutionally to make the presupposition because they would not be able to perform that which was not a legal norm. The normative legal order is a hierarchy of MEANING, a hierarchy of "ought-ness", a hierarchy of norms. A judge is therefore logically a MEANING, a legal norm. Since he is a legal norm, and since all legal norms PRESUPPOSE the Grundnorm in that legal norms CANNOT exist without a Grundnorm, the judge - a legal norm - necessarily presupposes the Grundnorm.

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(Note: As statutes play a profoundly insignificant role in this Thesis, and as they are very few in number, it is not proposed to provide a Table of Statutes.)

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